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No. _____

In the
Supreme Court of the United States

LIVING CARE ALTERNATIVES OF
KIRKERSVILLE, INC., AND
LIVING CARE ALTERNATIVES OF UTICA, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 4, 2007

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QUESTIONS PRESENTED

Congress enacted the Restructuring and Reform Act of 1998 "RRA", specifically the provisions for Due Process Notice and Collections Due Process Hearings, in order to make sweeping changes to rein in the IRS and protect taxpayers from onerous government collection efforts. The new law provides that the impartial IRS Appeals Officer, in a statutory Collection Due Process Hearing for a taxpayer who is contesting the filing of a lien or levy, is directed by statute to determine ". . .(w)hether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary. " 26 U.S.C. sec. 6330 (c) (3) (C) (the balancing test). An adverse decision can be appealed by the taxpayer to the District Court or Tax Court depending on the underlying tax liability. Courts will review the determination for an abuse of discretion by the Appeals Officer in its balancing of these equitable considerations in the balancing test.

The questions presented:

whether the court's judicial review and application of the doctrine of collateral estoppel failed to effectuate congressional intent to prevent overreaching collection actions, when the liens and levies will generate no recovery by the IRS and will shut down two nursing homes, even though alternative collection methods are available;

should the doctrine of collateral estoppel be applied in a Collections Due Process Hearing, when special

circumstances exist and when controlling facts change because of the Appeals Officer's analysis, so that to apply collateral estoppel would prevent congressional intent from being effectuated.

LIST OF PARTIES

Petitioners are Living Care Alternatives of Kirkersville, Inc. ("Living Care Kirkersville"), and Living Care Alternatives of Utica, Inc. ("Living Care Utica") (collectively referred to as "Living Care"). Respondent is the United States of America, Internal Revenue Service ("IRS").

RULE 29.6 STATEMENT

The Disclosure of Corporate Affiliations and Financial Interest has been filed in the cases below. Living Care Alternatives of Kirkersville, Inc. and Living Care Alternatives of Utica, Inc. are not subsidiaries of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio for Petitioner, Living Care Alternatives of Kirkersville, Inc., is unpublished, but unofficially published at 2005 U.S. Dist. LEXIS 22446, 2007-2 U.S. Tax Cas. (CCH) P50,696, 96 A.F.T.R.2d (RIA) 6155 (S.D. Ohio 2005)3. It is reproduced herein in Appendix C.

The opinion of the United States District Court for the Southern District of Ohio for Petitioner, Living Care Alternatives of Utica, Inc., is unpublished, but unofficially published at 97 A.F.T.R. 2d 1008 (S.D. Ohio 2006). It is reproduced herein in Appendix B.

These District Court cases were consolidated on appeal. The Opinion of the three judge panel of the Sixth Circuit Court of Appeals is unpublished, but unofficially published at 2007 U.S. App. LEXIS 21608; 2007 FED App. 0658N (6th Cir.); 2007-2 U.S. Tax Cas. (CCH) P50,697; 100 A.F.T.R.2d (RIA) 5913. (Referred to as "Living Care Alternative Kirkersville and Utica"). It is reproduced herein in Appendix A.

Although not the subject of this appeal, the preceding Sixth Circuit Court of Appeals decision on the appeal of two district court opinions are also included in the Appendix.

The opinion of the United States District Court for the Southern District of Ohio, Case No. 02:03-CV-0359 ("Living Care Utica I") (*Living Care Alternatives of Utica, Inc. v. United States of America*, 2004 U.S. Dist. LEXIS 2233, 93 A.F.T.R.

2d (RIA) 761 (S.D. Ohio 2004; on appeal, Case No. 04-3194) is reproduced herein at Appendix E.

The opinion of the United States District Court for the Southern District of Ohio, Case No. C2-02-717 ("Living Care Utica II") (*Living Care Alternatives of Utica, Inc. v. United States of America*, 312 F. Supp.2d 929, 2004 U.S. Dist. LEXIS 6017, 93 A.F.T.R.2d (RIA) 1515; on appeal, Case No. 04-3554) is reproduced herein at Appendix D.

The opinion of the Sixth Circuit Court of Appeals affirmed these decisions of the District Court and is published at *Living Care Alternatives of Utica, Inc. v. United States of America*, 411 F.3d 621 (6th Cir. 2005). It is reproduced herein at Appendix F.

JURISDICTION

This action originated in the United States District Court for the Southern District of Ohio Eastern Division. Two separate cases filed by Living Care Alternatives of Utica, Inc. were consolidated at the District Court, and a separate case was filed by Living Care Alternatives of Kirkersville, Inc. The appeals of these cases were consolidated by the Sixth Circuit Court of Appeals. The opinion of the Sixth Circuit Court of Appeals was entered September 5, 2007. This Court has jurisdiction under 28 U.S.C. sec. 1254.

RELEVANT STATUTES

The Petition is based upon the due process and hearing provisions imposed on the Internal Revenue Service pursuant to 26 U.S.C. sections 6320 and 6330.

These provisions of the Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (1998) ("RRA") require that the IRS provide the taxpayer with notice and opportunity for a collections due process hearing ("CDP hearing") upon the filing of notice of lien (sec. 6320) and before levy (sec. 6330). In particular, section 6330 (c) (3) (C) requires the IRS Appeals Officer to consider in its determination certain issues before going forward with a lien or levy. The Appeals Officer must conduct a verification that the IRS has met all legal requirements and fulfilled its procedural obligations and to determine whether to allow the IRS to pursue its collection actions based in part on "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." (referred to as the "balancing test")

The taxpayer may appeal an adverse decision to the District Court when the underlying tax liability is not subject to the jurisdiction of the Tax Court. 26 U.S.C. section 6330 (d) (1) (B).

Furthermore, the IRS is required to conduct a thorough investigation of the status of the property before levying, to determine that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to such liability.

> "No levy before investigation of status of property
>
> (1) In general
>
> For purposes of applying the provisions of this subchapter, no levy

may be made on any property or right to property which is to be sold under section 6335 until a thorough investigation of the status of such property has been completed.

(2) Elements in investigation
For purposes of paragraph (1), an investigation of the status of any property shall include -

(A) a verification of the taxpayer's liability;

(B) the completion of an analysis under subsection (f);

(C) the determination that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to such liability; and

(D) a thorough consideration of alternative collection methods."

26 U.S.C. sec. 6331 (j)

STATEMENT OF THE CASE

Living Care Utica and Living Care Kirkersville have filed this Petition for Writ of Certiorari to appeal the decisions of the Sixth Circuit Court of Appeals which affirmed in part the decision of the District Court for the Southern District of Ohio. This appeal seeks to reverse the adverse determination in the Collection Due Process Hearings which confirmed the IRS collection actions--filing of liens and notices of intent to levy, which when executed would not recover

any funds for the IRS and would shut down the nursing homes.

BACKGROUND FACTS AND ISSUES

Living Care Utica operates Utica Care Center, a small, 32 bed, skilled nursing facility in rural central Ohio. Living Care Kirkersville operates Pine Kirk Care Center, a small, 24 bed, skilled nursing facility, also in rural central Ohio. Both specialize in caring for residents who do not assimilate in larger nursing homes. Almost totally dependent on government funding, primarily Medicaid and some Medicare, and subject to ever increasing regulations and demands, both have struggled through state regulations that decreased census at nursing homes in Ohio from the mid-1990's to 2000 from 95% to 75% statewide and at each facility within a twelve month period. Years of effort have built back census to almost 100% occupancy today. But low census and Medicaid per diem rates that penalized nursing homes for less than 95% occupancy caused declining revenue, and both facilities incurred tax delinquencies[1] and other debts. *See* R.1.[2]

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[1] Prior to the instant cases, Living Care Utica filed three cases in District Court to appeal the adverse decisions in two collection due process hearings. One case was dismissed because it duplicated an existing case. The remaining two cases are referred to as Living Care Utica I and Living Care Utica II. District Court Case No. 02:03-CV-0359 ("Living Care Utica I") involved annual unemployment taxes for 1999 and quarterly withholding obligations for 12/31/99, 6/30/01 and 9/30/01, and 6721 tax for 1999 (*Living Care Alternatives of Utica, Inc. v. United States of America*, 2004 U.S. Dist. LEXIS 2233, 93 A.F.T.R. 2d (RIA) 761 (S.D. Ohio 2004; on appeal, Case No. 04-3194 (Appendix E)). *See*

Government policy rules how a nursing home will operate–what residents it admits, what staff it hires, how many it hires, what expenses it will reimburse and how much it will reimburse.[3] Government policy regulates and surveys standards of care. Living Care met the staffing standards, suffered through reimbursement changes that repeatedly cut back revenue reimbursement rates and then froze rates at the decreased level.[4]

R.1 in Living Care Utica I; (Appendix A, p. 3a-4a). District Court Case No. C2-02-717 ("Living Care Utica II") involved annual unemployment taxes for 1995 and 2000, quarterly unemployment for 12/31/98, and quarterly withholding taxes for 12/31/95, 3/31/96, 6/30/96, 3/31/99, 9/30/99, 3/31/00, 6/30/00, 9/30/00, 12/31/00, and 3/31/01 (*Living Care Alternatives of Utica, Inc. v. United States of America*, 312 F. Supp.2d 929, 2004 U.S. Dist. LEXIS 6017, 93 A.F.T.R.2d (RIA) 1515; on appeal, Case No. 04-3554 (Appendix D)). *See* R. 1 in Living Care Utica II; (Appendix, p. 4a). The District Court found that there had been no abuse of discretion. Their appeals were consolidated for final argument and decision. The Court of Appeals affirmed the decision of the District Court. *Living Care Alternatives of Utica, Inc. v. United States of America*, 411 F.3d 621 (6th Cir. 2005) (Appendix F).

[2] Citations to record evidence refer to the docket number in the district court case.

[3] Nursing homes have been called the most regulated industry in the country, even more regulated than the nuclear power industry. In Ohio, approximately 25% of the nursing homes have less than 50 beds.

[4] The State of Ohio in the mid 1990's reduced the growth of Medicaid and Medicare expenditures. It did so by a two pronged tactic–first, it established PASSR which had the effect of

Both Living Care Utica and Living Care Kirkersville have no equity in assets subject to the lien and levy (due to senior perfected security interests). A levy would produce nothing for the IRS because of these senior interests. A levy on Medicaid funds would shut down the business because there are no other significant revenue sources, and there are no borrowing sources. R.1. Living Care Kirkersville and Living Care Utica III and IV.; R. 13, Living Care Kirkersville; R. 15 and 22, Living Care Utica III, ; R. 16 and 24, Living Care Utica IV.

There are no other cases (1) where the levy would yield nothing in taxes from execution of the IRS levy

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deliberately reducing the number of residents admitted to nursing homes so that the occupancy in some homes in the state dropped from approximately 95% to 75% in one year, and the state-wide average occupancy began a five year decline of 2% per year from the mid 1990's to 2000 (95 to 85% approximately); and second, it maintained reimbursement penalties for average occupancy rates below 95% and 85% thresholds, until the year 2000. This decreased the percentage at which the State reimbursed actual cost. As a nursing home's occupancy decreased, the state decreased the percentage that it paid of actual costs. The government put facilities in a double-bind by cutting occupancy and then penalizing them for lower occupancy by cutting reimbursement rates because of the lower occupancy. This undermined and literally eliminated the opportunity for operational effectiveness and cost efficiency, the source of profitability, therefore, a triple-bind.

Finally in 2000, after five years, the State recognized its error and changed its Medicaid reimbursement rate setting which marginally relaxed the penalty for low census. However, for the last four years, this was accompanied by three years of rate cuts up to 6% in each year.

because senior liens on overencumbered assets would take all proceeds, (2) where the levy would destroy the nursing homes, (3) involve a private business that is almost 100% funded by state and federal government sources, (4) involve competing public policy and government mandates, where the decision to pay a bill means either pay taxes or pay for food, utilities, staff, medication, in order to care for residents and comply with regulations.

Living Care Utica–Procedural Background:

Living Care Utica I

The IRS issued Notices of Intent to Levy on July 31, 2002 and Notice of Federal Tax Lien Filing dated August 15, 2002 to Living Care Utica for quarterly withholding and annual unemployment taxes for the period ending 12/31/01. The IRS also issued a Notice of Levy dated September 25, 2002 and Notice of Federal Tax Lien Filing dated October 4, 2002 for withholding tax for the quarter ending 3/31/02. Living Care Utica timely filed its request for a Collections Due Process hearing and explained its objection to the lien in an attachment to the hearing request form. A hearing was held by phone on March 13, 2003. The Appeals Officer issued his determination letter dated July 3, 2003, affirming the IRS levy and lien. Living Care Utica timely filed its appeal of this decision by filing a Complaint in District Court on August 8, 2003 (Case No. 2:03-cv-717; "Living Care Utica III"). *See* R. 13 (Appendix, p. 3a-9a).

Living Care Utica II

The IRS also issued Notice of Federal Tax Lien Filing dated 4/17/03 for withholding taxes for the quarter ending 6/30/02. Living Care Utica timely filed its request for a CDP hearing and attached to the request form its objection to the lien. A hearing was held by phone on 10/16/03. The Appeals Officer issued her determination letter dated November 24, 2003, affirming the IRS lien. Living Care Utica timely filed its appeal of this decision by filing its Complaint in District Court on December 24, 2003 (Case No. 2:03-cv-1209; "Living Care Utica IV"). *See* R.13.

The cases were consolidated and the District Court issued its decision on November 14, 2005, applying the doctrine of collateral estoppel from the Sixth Circuit's decision in Living Care I and II, and affirmed the liens and levies. (Appendix B, p.40a-41a). An appeal was timely filed on January 11, 2006. Living Care III was assigned Case No. 06-3163, and Living Care Utica IV was assigned Case No. 06-3166. The cases were consolidated by order entered 3/20/06. Prior to oral argument, the cases were consolidated for oral argument and decision with Living Care Kirkersville by order entered 9/29/06. (Appendix, P. 8a-9a).

Living Care Kirkersville Procedural Background:

The IRS issued a Notice of Federal Tax Lien Filing dated August 11, 2003 for withholding taxes for the quarters ending 3/31/00, 6/30/00, 9/30/00, 12/31/00 and 3/31/00, and annual unemployment tax for 2000. Living Care Kirkersville timely filed its request for a CDP hearing and attached to the request form its

objection to the lien. A hearing was held by phone. The Appeals Officer issued her determination letter dated 3/18/04, affirming the IRS lien. Living Care Utica timely filed its appeal of this decision by filing its Complaint in District Court on April 16, 2004 (Case No. 2:04-cv-00293). The District Court applied the doctrine of collateral estoppel and found that it precluded Living Care Kirkersville from litigating its claim. The Court also found that, absent the doctrine of collateral estoppel, the Appeals Officer had not abused his discretion. The Court affirmed the lien by order dated 8/29/05. An appeal was timely filed on 10/27/05. (Appendix, 9a-12a).

The Court of Appeals upheld the application of collateral estoppel for Living Care Utica's claims related to the levies, but not to the lien which had not been part of Living Care Utica I and II. The Court rejected the application of collateral estoppel to Living Care Kirkersville due to lack of privity. However, the Court concluded that the Appeals Officers conclusions "do not evidence the 'abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS.'" 2007 U.S. App. LEXIS at 9. (Appendix, p. 31a).

REASONS FOR GRANTING THE PETITION

A. A dismal "taxpayer success rate" of .5% reversal on appeal means that the courts have rendered the law utterly ineffectual in protecting against IRS excess. Courts have failed to fulfill congressional intent of the Restructuring and Reform Act of 1998 "RRA" to rein in the IRS. It stretches the imagination to believe that the abuse Congress intended to prohibit occurs in only 5 of 550,000 cases. Courts affirm the IRS in 99.5% of

CDP appeals. The taxpayer wins in approximately five cases annually out of the 1085 appeals filed from the 550,000 collection due process notices sent by the IRS.[5]

Courts need guidance in reviewing cases on the merits in order to do what Congress intended in protecting taxpayers.

1. Judicial deference to the IRS and various standards of judicial review of issues of IRS abuse of discretion have led to this judicial failure to enforce the law.

2. The court below has also applied the doctrine of collateral estoppel which has barred its review of this case on the merits.

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[5] The most recent statistics are from 2002 and 2003. In 2002, the Courts disposed of 1,085 CDP appeals. Danshera Cords, *How Much Process Is Due? IRC Sections 6320 and 6330 Collection Due Process Hearings*, 29 Vt. L. Rev. 51 (Fall 2004) at 60. This is 1085 appeals out of approximately 555,000 notices of collections that the taxpayer can request a collections due process hearing. But the courts rarely reverse appeals on the substance--about once in 200 cases. (Statistics from 2003). Brian Camp, *The Failure of CDP, Part 2: Why It Adds No Value*, 104 Tax Notes 1567, 1570-1571 (2004).

One would expect that if the Appeals Officers were reversing the decisions of the IRS agents (the "originating functions"), the IRS would report on the success of the law. But this is not being reproted. So one can assume that the IRS prevailed in the 554,995 cases that remain from the 5 that were reversed on appeal.

3. Statistics show that the law is virtually ineffective in causing the changes that Congress sought–to stop abuse in collection, to reform the IRS and to hold it accountable.

4. Abuse still exists. The IRS still goes too far in its collections, as here where the assets are overencumbered and subject to prior valid, perfected liens, where a levy would yield nothing. Courts allow it by refusing to really examine the "balancing test" by the Appeals Officers.

5. The IRS Appeals Officers rubber stamp the decisions of their agents.

6. Courts rubber stamp the CDP Hearing decisions of the Appeals Officers.

Congressional Intent:

Congress envisioned that the law would rein in the IRS and cause changes to protect taxpayers from onerous government collection efforts. But the independent review and judicial review that Congress envisioned from this law has turned out to be the protector of the IRS. Congress singled out the IRS for change. It enacted the most comprehensive overhaul

of the IRS in years.[6] (Sen. Roth) LEXSEE 144 Cong. Rec. S. 7621, p.1-2, July 8, 1998.

> (T)he more people you talk to, the more nightmares you hear. The problems at the IRS, however, go far beyond the actions of a few agents at the IRS. For years, the agency has fostered a climate where taxpayers fe(lt) scorned, rather than served. . . " (Sen. Dodd) LEXSEE 144 Cong. Rec. S. 7717, p. 13-14, July 9, 1998.

> We listened to outrageous stories from innocent Americans who. . .got caught in the crosshairs of an organization that was driven by quotas and lacking in oversight. Our outrage knew no partisan line. Colleagues on both sides of the aisle were offended by many of the stories." (Sen. Roth) LEXSEE 144 Cong. Rec. S. 7621, p. 1-2, July 8, 1998.

The IRS had gone unfettered, without major reform, for over four decades. Lexsee 144 Cong. Rec. H

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[6] The Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (1998) (the "RRA") following a year of congressional investigations and hearings involving highly publicized criticism or abusive collection methods by the Internal Revenue Service ("IRS").These sections had no counterparts in prior law. Gerald A. Kafka, *Reformation of the Tax Collection Process-Cumulatively, A Giant Step*, 86 J. TAX'N 207 (1998). Cords, *How Much Process Is Due?I.R.C. Sections 6320 and 6330 Collections Due Process Hearings*, 29 Vt. L.Rev.51 (Fall 2004); Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. Cin. L. Rev. 1021 (Spring, 2005).

5304, p. 2-3, June 25, 1998. Congress, which had heard stories of IRS abuse for years from their constituents, listened to the horrors reported by the National Commission on Restructuring the IRS, held its own hearings, recognized the pervasiveness of the abuse in the IRS. Sen. Graham, LEXSEE 144 Cong. Rec. S 7621, p. 21-23, July 8, 1998.

Congress demanded change and accountability. "Taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor." S. Rep. No. 105-174 (1998). Crossing party lines, the law was approved almost unanimously.[7]

The problem is that now, nine years later, almost 100% of all cases filed under this law are decided in favor of the IRS. The decisions of this and other courts 99.5 times out of 100 cases have eviscerated the Restructuring and Reform Act of 1998.[8]

Congress wanted change, reform and accountability. This legislation has two essential goals: to make the IRS more accountable to private citizens and to transform its culture into one that

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[7] Senate–96 yes, 2 no, 2 abstaining, LEXSEE 144 Cong. Rec. S. 7717, July 9, 1998; House, 388 yes, 1 no, 44 abstaining. LEXSEE 144 Cong. Rec. H. 3936, May 22, 1998. The Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (1998) (the "RRA").

[8] Sections 6320 and 6330 impose due process requirements and govern the actions of the Internal Revenue Service in order to protect the rights of taxpayers.

resembles the customer service orientation of a well-run business. LEXSEE 104 Cong. Rec. S. 7717, p. 1, July 9, 1998

> . . . (T)he IRS Reform Bill is grounded in the principles of consumer protection and accountability. We all agree that the IRS should run more like a business, focusing on management efficiency and high standards of performance. But businesses answer to shareholders and the bottom line. The IRS must answer to the American people. And for too long, the agency has operated as if it answered to no one. (Sen. Kohl) LEXSEE 104 Cong. Rec. S. 7717, p. 15, July 9, 1998

> . . . . (W)e are finally taking up passage of legislation designed to rein in the IRS. We have all heard the stories about the worst IRS nightmares in the Nation, people committing suicide, families going bankrupt and losing their small businesses. . .The IRS has an extremely important job to do, but today we are making their job a little bit easier, and we are making the IRS a more fair, more efficient, and more taxpayer-friendly agency. But my friends, this bill is only the beginning. . . (Rep. Rothman) Lexsee 144 Cong. Rec. H 5304, p. 9, June 25, 1998. Congress promised it would stop the IRS abuses of power that it documented in over a year of public hearings.[9] Congress saw

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[9] Congress knew that taxpayers were harassed and strong armed by the IRS: "it is our intent that this never happens again. The

> IRS abuse as rampant. Sen. Bryan, 144 Cong. Rec. 7621, p. 35, July 8,1998. "The treatment these taxpayers received appalled me--and. . . they seem to be occurring more and more frequently." Sen. Hatch, Id. At 48-40.[10]

Judicial Review and Collateral Estoppel Must Fulfill Congressional Intent

When judicial review defers to the IRS and results in decisions affirming the IRS 99.5% of the time, then the judiciary is not following congress' intent to stop IRS excesses.[11] Courts have thwarted congressional intent to stop IRS excess by their limited and deferential judicial review and the application of collateral estoppel. Collateral estoppel should not have been applied here. The Court should look for the

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legislation we have before us is specifically designed to stop the kind of abuse you suffered, and we will continue to maintain a vigilant watch over this agency. (Sen. Lott) (Emphasis added) LEXSEE 144 Cong. Rec. S. 4223-6. We said that we would press forward, and we promised reform. (Emphasis added) (Sen. Roth) LEXSEE 144 Cong. Rec. S. 7621, July 8, 1998.

[10] One of the reasons Sen. Hatch ran for Senate was because of the abuses he saw as an attorney representing clients against the IRS.

[11] The CDP Hearing system and judicial review is inherently flawed because without any record for the courts to review, this Court has presumed that judicial review was to be deferential to the decisions of the IRS in Living Care I and Living Care II. Deferential review prevents courts from substituting their judgment. Cords, 73 U. Cin. L. Rev. at 1021.

abuse of discretion by the IRS in its performance of the balancing test.

Judicial Review and Standards of Review

Courts have used different standards of review.

The Sixth Circuit Court of Appeals in the instant case followed Living Care Utica I and II, holding that "(t)he. . . conclusions by the Appeals Officers do not evidence the "abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS." *Living Care Kirkersville and Utica*, 2007 U.S. App. LEXIS at 10, citing to the prior appellate decision, *Living Care Alternatives of Utica*, 411 F.3d at 631 (Appendix, p. 31a). But the court in Living Care Utica I and II admitted to the lack of clarity about judicial review largely due to how the I.R.S. has acted in the past as a creditor with extraordinary remedies.

> The method or standards for judicial review of these hearings is not yet settled, hence the problems in these cases. Prior to this Act, the IRS had the right to levy on taxpayer property without any prior opportunity for a hearing or procedural due process, so long as post-deprivation procedures were provided. The Supreme Court sustained this approach almost seventy-five years ago. *See Phillips v. Commissioner*, 283 U.S. 589, 595, 75 L. Ed. 1289, 51 S. Ct. 608, 1931-1 C.B. 264 (1931). While passage of the Restructuring and Reform Act does indicate Congress's intent to provide taxpayers with additional protection in the form of procedures prior to IRS action, it must be

interpreted in this historical context. Tax liens and levies are not typical collection actions; the IRS has much greater latitude and leeway than a normal creditor. *See generally* Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?* 41 Hous. L. Rev. 1145 (2004) (discussing the history of due process in tax collection proceedings). . .

Judicial review of collection due process hearings presents a real problem for reviewing courts. Congress overlaid the Restructuring and Reform Act on a previous system that involved very little judicial oversight. The result is a surprisingly scant record, comprised almost exclusively of the parties' appellate briefs and the Notice of Determination letter. No transcript or official record of the hearing is required and, accordingly, one rarely exists. Since normal review of administrative decisions requires the existence of a record, *see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971), overruled on unrelated grounds by Califano v. Sanders, 430 U.S. 99, 105, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)*, Congress must have been contemplating a more deferential review of these tax appeals than of more formal agency decisions. This might explain why, of six collection due process cases reviewed by the Sixth Circuit, five have been disposed of under our Court's *Rule 34* and all six have been unpublished. None has overturned the IRS decision or required a remand . . . *Living Care Alternatives of Utica, Inc. v. United States of*

America, Internal Revenue Service, 411 F.3d at 624-625 (Appendix, p. 87a).

The Second Circuit used a different standard of review:

". . . (it) would be an abuse of discretion if it (the IRS decision) were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, . . . on other considerations that Congress could not have intended to make relevant . . . The task of (this) court, therefore, is not to determine whether in its own opinion . . . "that an installment agreement would best serve both the interests of the IRS and MRCA, "but to determine whether there is an adequate basis in law for the (officer's) conclusion that it did not." MRCA Info Services v. United States, 145 F. Supp. 2d 194,199 (D. Conn. 2000) emphasis added.

Another standard has been used also: "An arbitrary, capricious, whimsical or mainfestly unreasonable judgment" Mesa Oil Id. (2000 U.S. Dist. LEXIS 20580 (D. Colo. 2000) at 7313, emphasis added, citing Coletti v. Cudd Pressure Control, 169 F. 3d 766, 777 (10th Cir. 1999).

Still another standard is: "a plain error,discretion exercised to an end not justified by the evidence, or judgment that is clearly against the logic and effect of the facts as are found." AJP Management v. United States, 2000 WL 33122693 (C.D. Cal); 87 AFTR 2d

2001-347, 348, citing to Wing v. Asarco, 114 F.3d 986 (9th Cir. 1997) emphasis added.

This Court's guidance is needed to produce compliance with congressional intent.

Collateral Estoppel:

The courts need guidance from this Court in the application of collateral estoppel in the context of collections due process hearings where the factual analysis is the controlling factor in the balancing test. Otherwise it becomes another tool to rubber stamp the IRS decisions.

The Court of Appeals noted the lack of authority in this area of collection due process hearings. 2007 U.S. App. LEXIS at 9. It followed Commissioner v. Sunnen in its analysis:

> (w)here two cases involve income taxes in different taxable years, collateral estoppel must be used within its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and *where the controlling facts* and applicable legal rules *remain unchanged*.
> 333 U.S. 591, 599-60, 68 S.Ct. 715, 921 L.Ed. 898 (1940); *see also Kennedy v. Comm'*, 876 F.2d 1251, 1257 (6th Cir. 1989) italics added. (Appendix, p. 14a-15a).

However, the Court found that there was no change in the controlling facts of cases, stating it "would be particularly problematic in establishing collateral estoppel in collection due process proceedings such as these because of the deferential review Congress contemplated would be given to tax appeals versus other agency decisions." *Living Care Kirkersville and Utica*, 2007 U.S. App. LEXIS 21608, 5, citing *Living Care Alternatives of Utica*, 411 F.3d at 625 ("Judicial review of collection due process hearings" historically "involved very little judicial oversight," consequently resulting in "a surprisingly scant record.") (Appendix, 15a).

In the collection due process balancing test, each Appeals Officer has to determine the facts and equities in each case, at that time and that place. The decision is driven by the facts, but as perceived and analyzed by the Appeals Officer. Here the controlling facts – the Appeals Officer analysis–differs from case to case. Under Sunnen, the doctrine should not be applied.

The Court of Appeals also utilized *Montana v. United States* to test whether the issues are substantively the same, and whether controlling facts or legal principles have changed, and whether other special circumstances warrant an exception to the normal rules of preclusion. 440 U.S. 147, 155 (1978), *ITT Corp. v. United States of America*, 963 F.2d 561 (2nd Cir. 1992). (Appendix, p. 15a-16a).

The Court found that while different appeals officers make different decisions:

> "(w)hether . . .(they) abused their discretion depends upon the reasoning of these particular officers. In other words, even though the appeals officers arrived at the same ultimte conclusion as the appeals officer in the prior litigation, it is possible that the appeals officers abused their discretion in the reasoning justifying that conclusion. Therefore, in this sense it is inappropriate to apply collateral estoppel.
>
> On the other hand. . .(b)lanket rejection of collateral estoppel amounts to an end run around applying the doctrine to particularized arguments. Id. at 6-7. (Appendix, p. 18a-19a).

The court went on to hold that collateral estoppel applied to all of Utica's claims except the count related to the lien, which had not been litigated in the prior case. no special circumstances. Id.

Yet the special circumstances clamor for court attention and which can only be heard absent collateral estoppel.[12] This case is one of the 99.5%

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[12] Tommy Thompson, former Secretary of Department of Health and Human Services, has analyzed the declining state of the health care industry and has predicted that the long term care system will implode by 2013 because the government's approach has been wrong. Caring for the Ages, Nov. 2005, Vol. 6, Number 11.

There is also the unique partnership of the government and nursing homes in the long term care industry. There is the utter inadequacy of post-deprivation remedies for Living Care--if the IRS levied and shut down the business, then Living Care has no

where the court affirmed the IRS despite the abuse of discretion by the IRS–it is unconscionable for the IRS to levy on Living Care Utica when the results would be

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real post-deprivation remedy. It has no means to pay the taxes and seek a refund in court. Clearly the residents who have lost their home, the staff who have lost their jobs, and the community which has lost its only nursing home, have no recourse.

Long Term Care is in a willing partnership between government and industry. *See PARCC Health Care, Inc. v. United States of America*, 238 F. Supp. 2d 435 (D. Conn. 2002), settlement reached and recorded in 2002 U.S. Dist. LEXIS 20705 (D. Conn. 2002). This case is factually similar but with a different remedy and its holding is not on point. But its analysis is. PARCC operated a nursing home and experienced financial difficulties, so that it didn't pay its trust fund taxes. PARCC stated that its financial difficulties stemmed from precipitous regulatory and reimbursement changes by the state. It stated that it continued to pay only the mandated and necessary expenses for resident care as the state required it to do. PARCC paid its taxes and filed a complaint for a refund of failure to file and failure to timely pay its employment taxes. The District Court examined the Second Circuit's *Fran Corp.* decision where the taxpayer had not demonstrated the reasonable cause for failing to pay trust fund taxes. *Fran Corp. v. United States*, 164 F. 3d 814,819 (2d Cir. 1999). It found PARCC's situation somewhere in between Fran and *East Wind Industries v. United States of America*, where the Third Circuit found reasonable cause and lack of willful neglect for failure to pay trust fund taxes. 196 F.3d 499 (3d Cir. 1999). The Court did not mention the Sixth Circuit approach of *Brewery, Inc. v. United States of America*, 33 F.3d 589 (6th Cir.1994). The court denied the IRS' motion for summary judgment and held that there was a question of fact about whether the nursing home had reasonable cause for its failure to pay its taxes because of financial difficulties and noted that it paid expenses to ensure adequate care of its patients and to comply with state and federal law. The parties later settled.

to shut down the business but without any funds from the levy going to the IRS.

Petitioners are not advocating a new theory that collateral estoppel and res judicata should not apply in tax proceedings, contrary to the Court's assertion. *Living Care Kirkersville and Utica*. 2007 U.S. App. LEXIS 21608, 5 (Appendix, p. 15a). Guidance from this Court is needed to determine the parameters for application of collateral estoppel specifically in CDP hearing appeals.

Balancing Test:

The requirement to balance the interests is inherently equitable. The A.O. is directed by statute to determine: ". . .whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." 26 U.S.C. sec. 6330 (c) (3) (C). emphasis added. The Court of Appeals held that the balancing was properly done and thus implicitly stated that it is equitable and the interests properly balanced where the business is shut down but the IRS does not recover anything from the collection. Every IRS agent and every court has endorsed this result. Petitioners still protest loudly and strongly that this just the type of harassment and abuse of power that Congress intended to prohibit through the RRA. What sounds like a shout to Petitioners is being heard as a whisper by the court. But that does not change the inequity.

Courts have agreed with IRS's argument that they are not required to investigate the available equity in

the taxpayers property at the CDP hearing and the failure to do so is not an abuse of discretion.

> "As this Court has noted, there is little about this requirement in Sixth Circuit case law and, in most cases, a reviewing court affirms the Appeals Officer's determination that the balancing test was correctly applied. *Living Care Kirkersville and Utica*, 2007 .S. App. LEXIS at 10, citing *Living Care Alternatives of Utica, Inc.*, 411 F.3d at 629. Current case law supports the Government's argument that the IRS is not required to include in its balancing analysis whether it "will receive any revenue from a levy or sale, or whether the business will have to close down due to the levy or sale." *Living Care Alternatives of Utica*, 411 F.3d at 628; *Medlock v. United States*, 325 F. Supp. 2d 1064,1079 (C.D. Cal. 2003) (holding that the appeals officer was not required to consider the impact of a levy on the taxpayer's customers).

The IRS has said that it does not have to review its lien position until it reviews the efficacy of a levy or lien before it collects. 26 U.S.C. sec. 6331 (j)(2)(C). However, post-deprivation remedies are not adequate to redress any wrongs done by the IRS in this collection process.[13] There is no hearing, no recourse

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[13] *Living Care Alternatives of Utica*, 411 F.2d at 627, *Johnson Home Care Services*, 2005 U.S. Dist. LEXIS at 4, citing *Medlock v. United States*, 325 F. Supp. 2d 1064, 1080 (C.D. Cal. 2003), *Kitchen Cabinets, Inc. v. United States*, 2001 U.S. Dist. LEXIS 2388, 2001 WL 237384 at *2 (N.D. Tex. Mar. 6, 2001).

for a taxpayer by the time collections reaches this point. And if a business is closed by a levy, then post-deprivation provisions of the law are meaningless, how would a business pay the taxes and then seek a refund once the business was shut down? There is no post-deprivation remedy for the nursing home residents, for the staff, or for the business.[14] This is the kind of egregious facts and IRS excess that Congress set out to stop.

Congress has addressed this issue: "For too long, we've seen a 'shoot first, ask questions later' approach to enforcement by the IRS. . .(the law) will help ensure that the IRS exercises appropriate caution and consideration prior to commencing an enforcement action against any taxpayer. Sen. Dodd, LEXSEE 144 Cong. Rec. S. 7717, p. 13-14, July 9, 1998. If the IRS shoots first here, there will be no one to ask questions of later.

CONCLUSION

Congress mandated change. Neither the IRS nor the courts have followed its intent. The RRA was "about remembering who the federal government is here to serve and what it is here to do. Of all the powers bestowed upon a government, the power of taxation is the one most open to abuse. . .We are talking about heavy-handed abuses of enforcement

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[14] But there are other collection avenues available to the IRS that would generate tax collection and that would not shut down the business–if only the IRS would recognize those proposed by Living Care.

powers. . .it is a reprehensible behavior by government. It must stop." Sen Hatch, 144 Cong. Rec. S. 7621, p. 50, July 8, 1998.

Petitioners ask this Court to provide guidance to the courts on these important questions of the proper standard of judicial review, the application of the doctrine of collateral estoppel in CDP hearings and the abuse of discretion by IRS Appeals Officers.

Respectfully submitted on this the 4th day of December, 2007.

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* (Motion for Admission has been submitted contemporaneous with the filing of this document)

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-4418, 06-3163 and 06-3166

[Filed September 5, 2007]

LIVING CARE ALTERNATIVES OF KIRKERSVILLE, INC. (05-4418),

and

LIVING CARE ALTERNATIVES OF UTICA, INC. (06-3163 and 06-3166),
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

OPINION

Before: GIBBONS and McKEAGUE, Circuit Judges; and BUNNING, District Judge.*

DAVID L. BUNNING, District Judge. In these consolidated appeals, Plaintiffs-Appellants Living Care Alternatives of Kirkersville, Inc. ("Living Care Kirkersville") and Living Care Alternatives of Utica, Inc.. ("Living Care Utica") appeal the district courts' summary affirmances of the Internal Revenue Service ("IRS") Appeals Officers' administrative decisions upholding the filing of tax levy and/or lien notices against them. The Government argues the district courts properly concluded that the matters raised by Living Care Kirkersville and Living Care Utica were previously litigated in *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005), and are, therefore, barred by collateral estoppel. In the alternative, the Government argues that the Appeals Officers did not abuse their discretion in concluding that the need for the efficient collection of taxes outweighs Appellants' concern that the collection action be no more intrusive than necessary.

Appellants, on the other hand, offer that the doctrine of collateral estoppel does not apply because the facts and issues in these consolidated cases are different from those in *Living Care Alternatives of Utica*. Moreover, Appellant Living Care Kirkersville maintains that privity between it and Living Care

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* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Utica to collaterally estop its challenges is lacking. Absent application of collateral estoppel, they contend the IRS Appeals Officers abused their discretion by confirming a tax collection method that would destroy their businesses, yet yield nothing in tax collections.

For the reasons that follow, this Court AFFIRMS the respective district court decisions.

I. BACKGROUND

Living Care Kirkersville and Living Care Utica are Ohio corporations. Each operates long-term nursing care facilities in Licking County, Ohio. The sole shareholder and officer of both corporate entities is Thomas J. Rosser ("Rosser"). Medicaid payments are the primary funding source for each facility. According to Appellants, each facility is struggling financially, due in large part to the substantial government regulation of nursing homes and insufficient government payment under Medicaid to maintain regulatory compliance and also generate a profit.

A. The Living Care Utica Proceedings

Living Care Utica has initiated four district court actions challenging tax liens and levies for unpaid employment taxes and unemployment tax liabilities.[1] The first two district court cases were consolidated by

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[1] There was a fifth Living Care Utica district court case, but that action was voluntarily dismissed upon recognition that it challenged an IRS notice duplicating that issued in Sixth Circuit Case No. 06-3163.

this Court. Case No. 04-3194 *(Living Care Utica I)* involved annual payments for tax year 1999 and quarterly payments in 1999 and 2001. Case No. 04-3554 *(Living Care Utica II)* involved annual payments for tax years 1995, 1998, and 2000, and quarterly taxes for various quarters in 1995, 1996, 1999, 2000 and 2001. That consolidated appeal culminated in this Court's decision in *Living Care Alternatives of Utica v. United States,* 411 F.3d 621 (6th Cir. 2005).

The later two district court appeals, Case No. 06-3163 *(Living Care Utica III)* and Case No. 06-3166 *(Living Care Utica IV),* were consolidated by both the district court and this Court. *Living Care Utica III* involves quarterly employment taxes for fourth quarter 2001 and first quarter 2002 and annual unemployment taxes for 2001. *Living Care Utica IV* involves quarterly employment taxes for the second quarter of 2002.

On July 31, 2002, the IRS, in *Living Care Utica III,* sent Living Care Utica a final notice of intent to levy with respect to certain taxes, with a notice of federal tax lien filing for these liabilities subsequently sent on August 15, 2002. The IRS on September 25, 2002, sent Living Care Utica a final notice of intent to levy with respect to the remaining taxes at issue in that case, with a notice of federal tax lien filing for these liabilities subsequently sent on October 4, 2002.

On April 17, 2003, the IRS, in *Living Care Utica IV,* sent Living Care Utica a notice of federal tax lien with respect to the taxes at issue in that case.

Pursuant to 26 U.S.C. § 6320, each of the various IRS notices advised Living Care Utica of its right to a collection due process ("CDP") hearing with respect to the proposed levy and/or federal tax lien filings identified in the notices. Living Care Utica timely submitted forms requesting CDP hearings in both *Living Care Utica III* and *Living Care Utica IV*. In submitting those forms, Living Care Utica also identified by attachment the grounds upon which it was seeking further review.

In *Living Care Utica III,* the Appeals Officer conducted the CDP hearing on March 13, 2003, via telephone, after which on June 18, 2003, he issued a Summary and Recommendation addressing the various challenges raised by Living Care Utica and concluding that the levy and federal tax lien filings should be sustained. (Utica J.A. 280-85). His Summary and Recommendation was attached to the July 9, 2003, Notice of Determination sent by the IRS to Living Care Utica. (J.A. 279).

More particularly, Living Care Utica protested that its failure to pay payroll taxes was the result of decreased funding from government sources with no corresponding decrease in operating expenses. The Appeals Officer concluded that this calculated business decision to pay other debts instead of turning over withheld taxes was neither justification nor reasonable cause. Living Care Utica pointed to prior dealings with the IRS wherein an installment agreement was reached. However, the Officer concluded the prior dealings did not involve the tax periods at hand and were therefore not relevant to providing a basis for present relief. Living Care Utica pointed out various

factors contributing to its overall negative cash flow and consequent lack of funds to cover operating expenses. The Officer concluded these circumstances merely evidenced that an installment agreement was not a viable collection alternative, rather than providing a basis to grant Living Care Utica relief from the liens.

Living Care Utica also complained that the existing IRS liens prevent it from refinancing its real and personal property, the funds from which could be used to pay the taxes. But the Officer concluded that none of the circumstances of 26 U.S.C. § 6323(j) were present to sustain withdrawing the liens, and that since Living Care Utica reported there were other liens senior to those of the IRS, leaving its liens in place was reasonable to ensure preserving the Service's claim in the event of private sale. Living Care Utica also suggested that its Medicare and Medicaid payments may be exempt from levy. The Officer disagreed.

Finally, the Summary and Recommendation noted that, at hearing, Living Care Utica proposed filing an offer in compromise or private sale of the business as collection alternatives. But the Officer concluded that private sale was not a viable alternative, since the business had been for sale over two years at that point with no buyers. And as to the offer in compromise, the Officer concluded this was not a realistic alternative, since the required forms had been sent to Living Care Utica with no specific follow up by either the designated submission deadline or the time thereafter within which Living Care Utica stated that a formal offer would be forthcoming. The report concluded with the Officer's brief discussion of whether the need for

efficient tax collection had been balanced with Living Care Utica's concern that the proposed collection action be no more intrusive than necessary. He found this requirement met, since Living Care Utica had not provided proper documentation to evaluate proposed collection alternatives.

In *Living Care Utica IV*, the Appeals Officer conducted the CDP hearing on October 16, 2003, via telephone, after which she issued a report recommending that the subject federal tax lien filing be sustained. Her report and recommendation was attached to the November 24, 2003, Notice of Determination sent by the IRS to Living Care Utica.

The Officer's report concluded Living Care Utica raised no relevant challenges to the collection action and that none of the grounds for withdrawal of the lien pursuant to § 6323(j) had been shown. Although not outlined in the same detail as the Officer's report in *Living Care Utica III*, the challenges raised by Living Care Utica and rejected mirror those it raised in the prior proceeding. Namely, its attachment to its CDP hearing request identified it intended to propose an offer in compromise or sale or refinance as a collection alternative; that the lien was obstructing it from procuring refinancing; that the IRS would receive no revenue due to senior lienholders; and that it was unable to meet its tax obligations due to financial problems from over-regulation and under-funding by the government. In balancing the need for efficient collection with Living Care Utica's concern that the collection action be no more intrusive than necessary, the Appeals Officer noted that the lien was filed because Living Care Utica's tax liability was accruing,

and therefore protection of the tax liability was necessary. She noted that Living Care Utica had failed to submit sufficient documentation to establish that withdrawing the lien would facilitate a viable collection alternative nor was it compliant with current tax filing and deposit requirements to qualify to submit an offer in compromise. The Officer's report reflects that she attempted but was unsuccessful in reaching Living Care Utica to discuss the fact that an offer in compromise was not processable.

Following the IRS's issuance of Notices of Determination in *Living Care Utica III* and *IV*, Living Care Utica appealed each of these determinations to the district court for the Southern District of Ohio, challenging the IRS Appeals Office determinations. The district court consolidated the two appeals and stayed a ruling pending this Court's decision in *Living Care Alternatives of Utica*. Living Care Utica did not object to this stay.

This Court subsequently held in *Living Care Alternatives of Utica v. United States* that Living Care Utica failed to challenge its underlying tax liability at the collection due process hearing, and therefore, the standard of review was abuse of discretion; the Appeals Officer did not violate his statutory duty to balance the equities; the IRS did not have a duty to investigate existing liens on property prior to a collection due process hearing; the Appeals Officer's Notice of Determination provided sufficient notice for an abuse of discretion standard; and the Appeals Officer did not abuse his discretion in rejecting Living Care Utica's offer of compromise. 411 F.3d 621. Following the issuance of that decision, the Southern

District of Ohio on November 14, 2005, entered its Memorandum and Order in *Living Care Utica III/IV*. The district court found that all nine of the claims raised by Living Care Utica in *Living Care Utica III/IV* were barred by collateral estoppel because they had been raised, litigated, and decided in *Living Care Alternatives of Utica*, with the exception of claim two regarding Living Care Utica's purported inability to refinance due to the presence of the IRS liens. And as to the second claim, the district court found that the Appeals Officers did not abuse their discretion in rejecting Appellant's contention, when there was nothing in the record to support a finding that removing the liens and refinancing the property would have facilitated the collection of the tax liability. The Government's motions for summary affirmance in *Living Care Utica III* and *IV* were therefore granted by the district court. Appeals 06-3163 and 06-3166 followed.

B. The Living Care Kirkersville Proceedings

The Living Care Kirkersville case arises from its failure to pay quarterly employment taxes for March 2000 through March 2001 and its annual unemployment tax liabilities for the year 2000. On August 11, 2003, the IRS sent Living Care Kirkersville a final notice of federal tax lien filing, which notice also advised of the right to a CDP hearing. Living Care Kirkersville timely submitted a CDP hearing request on September 12, 2003, identifying its grounds for challenging the tax lien filing against it. A hearing officer with the Office of Appeals conducted the CDP hearing and subsequently issued a Summary and Recommendation to continue the subject federal tax

lien filing. (Kirkersville J.A. 35-38). This Summary and Recommendation was attached to a March 18, 2004, Notice of Determination letter sent by the IRS to Living Care Kirkersville informing it that the notice of federal tax lien was being upheld with respect to its tax liability. (Kirkersville J.A. 33-34).

Living Care Kirkersville's attachment of purported relevant considerations is substantially similar to that attached to the hearing requests in *Living Care Utica III/IV*. (Compare Kirkersville J.A. 4045 *with* Utica J.A. 272-75). The points presented by Living Care Kirkersville can be summarized as inability to meet tax obligations because of over-regulation and inadequate funding by the government; existence of senior lienholders, resulting in no leftover revenue for this tax lien; inability to obtain refinancing and consequent closure of the nursing home by continued imposition of the lien; and a proposed offer in compromise, sale, or refinancing as an alternative to the collection action.

The Appeals Officer's Summary and Recommendation rejected each of Living Care Kirkersville's challenges. As to the proposed collection alternative of an offer in compromise, Living Care Kirkersville had not evidenced a definite intention to submit an offer in compromise and the related financial information. As to the alternative of refinancing, the summary reflected Living Care Kirkersville had not evidenced how refinancing would result in funds to pay the IRS. The Appeals Officer also concluded that withdrawing the lien to facilitate refinancing was not warranted, because Living Care Kirkersville had failed to provide a specific refinancing

arrangement rather than a general assertion, and because it could apply for a certification of subordination of the tax lien and had not done so. Nor did the Appeals Officer agree that withdrawing or removing the lien was warranted due to the existence of senior lienholders that rendered the tax lien valueless, since the presence of such senior lienholders, if documented, actually supported the conclusion that the notice of lien was necessary to protect the government's interest pending payment of the taxes. And while Living Care Kirkersville advocated that its status as operator of a nursing home should afford it special consideration under the tax laws, the Appeals Officer concluded no lawful authority for affording special rights to such a taxpayer had been identified. Finally, the Appeals Officer noted that Living Care Kirkersville had not offered an alternative that would provide for the efficient collection of the outstanding taxes and also be less intrusive on it. Moreover, withdrawing the notice of federal tax lien would not serve to balance efficient tax collection against intrusiveness since there were other prior notices that would remain, and removing all of these notices would place the Government in a precarious position vis-à-vis other creditors and effectuating collection.

On April 16, 2004, Living Care Kirkersville filed a complaint with the district court, challenging this IRS Appeals Office determination. On November 8, 2004, the Government filed a Motion and Supporting Memorandum of Law for Summary Affirmance of the IRS Administrative Decision. In an Opinion and Order dated August 29, 2005, the district court found in favor of the IRS. (Kirkersville J.A. 74-80). The

district court concluded that Living Care Kirkersville is in privity with Living Care Utica and that the issues raised by Living Care Kirkersville were the same as those raised by Living Care Utica in *Living Care Alternatives of Utica*. In the alternative, the district court found that even if the doctrine of collateral estoppel did not apply, the Appeals Officer's decision to uphold the IRS collection action was not an abuse of discretion because removal of the lien would place the Government in a precarious situation with respect to competing creditors. Appeal 05-4418 followed.

II. ANALYSIS

A. Standard of Review

In cases involving CDP hearings, courts conduct a *de novo* review of IRS Appeals Office determinations when the underlying tax liability is at issue. However, when the underlying tax liability is not at issue, such decisions are reviewed for abuse of discretion. *Living Care Alternatives of Utica*, 411 F.3d at 625. In these consolidated appeals, Living Care Utica and Living Care Kirkersville do not challenge liability for the actual tax. Therefore, the IRS Appeals Office determinations in contest are reviewed under an abuse of discretion standard.

These appeals differ from this Court's earlier decision in *Living Care Alternatives of Utica* in that each raises questions as to the proper scope of collateral estoppel. A lower court's decision on whether collateral estoppel applies is reviewed *de novo*. *Heyliger v. State Univ. & Cmty. Coll. Sys. of Tenn.*, 126 F.3d 849, 851 (6th Cir. 1997). This includes

appellate review of a tax court's decision on the doctrine. *Hickman v. Comm'r*, 183 F.3d 535, 537 (6th Cir. 1999). Embodied within consideration of the conditions giving rise to collateral estoppel is the requirement of privity - that the party to be estopped was the party in the prior litigation, or in privity with such prior party. *Montana v. United States*, 440 U.S. 147, 153 (1979). Whether privity exists in a particular case is a question of fact, and questions of fact are reviewed for clear error. *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1109 (6th Cir. 1981).

B. Collateral Estoppel

Since collateral estoppel would render merits consideration a nullity on any issues so barred, its application is considered first. Its invocation dictates that a "'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . .'" *Montana*, 440 U.S. at 153 (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)). While res judicata acts to bar a party's later claims based on the same cause of action, collateral estoppel selves to bar the relitigation, on a different cause of action, of issues actually and necessarily determined by a prior court. *Id.*

Collateral estoppel applies where the following conditions are met: (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation; (2) the issue must have been actually litigated and decided in the prior action; (3) the issue must have been necessary and essential to a judgment

on the merits in the prior litigation; (4) the party to be estopped was a party to the prior litigation, or in privity with such a party; and (5) the party to be estopped had a full and fair opportunity to litigate. *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 704 (6th Cir. 2005); *United States v. Real Property Known and Numbered as 415 E. Mitchell Ave.*, 149 F.3d 472, 476 (6th Cir. 1998). Moreover, "[t]he doctrine applies to tax proceedings to the same extent it applies to proceedings in federal district court." *Hickman*, 183 F.3d at 537.

1. Living Care Utica

In *Living Care Utica III/IV*, Living Care Utica is the same party as in *Living Care Utica I/II*, and therefore privily is not in issue or contested. Nevertheless, Living Care Utica does protest that the issues in *Living Care Alternatives of Utica* that were necessary and essential to a judgment on the merits and that were actually litigated and decided after full and fair opportunity are not identical to those raised by it in the instant consolidated appeals.

> In *Commissioner v. Sunnen*, the United States Supreme Court cautioned that
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> [w]here two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the

> controlling facts and applicable legal rules remain unchanged.

333 U.S. 591, 599-600 (1948); *see also Kennedy v. Comm'r*, 876 F.2d 1251, 1257 (6th Cir. 1989). Living Care Utica submits that its issues are not "identical in all respects" to those presented in *Living Care Alternatives of Utica* because the cases involve different tax years, different facts, and different hearing officers conducting different analyses. However, *Sunnen* refers to an identity in the *matter raised*, without change in *controlling* facts, rather than identity of each and every fact. Nor must the presiding decision maker be the same in order to invoke collateral estoppel. Under Appellant's theory, neither collateral estoppel nor res judicata would virtually ever apply in tax proceedings. And as to Appellant Living Care Utica's belief that appeals officers' analyses are "different" unless each nuance considered in its later tax challenges replicates those from *Living Care Alternatives of Utica*, no authority is put forth for such proposition. If such identity were required, it would be particularly problematic in establishing collateral estoppel in collection due process proceedings such as these, because of the deferential review Congress contemplated would be given to tax appeals versus other agency decisions. *Living Care Alternatives of Utica*, 411 F.3d at 625 ("Judicial review of collection due process hearings" historically "involved very little judicial oversight," consequently resulting in "a surprisingly scant record.").

The Supreme Court has established a three-part test to determine if applying collateral estoppel is also

appropriate: (1) "whether the issues presented by [the subject] litigation are in substance the same as those resolved [in the prior case]"; (2) "whether controlling facts or legal principles have changed significantly since the [prior] judgment"; and (3) "whether other special circumstances warrant an exception to the normal rules of preclusion." *Montana*, 440 U.S. at 155.

As noted, the district court presiding over *Living Care Utica III/IV* identified nine claims presented by Living Care Utica in those consolidated administrative appeals. The district court summarized the claims presented by Living Care Utica on appeal as: (1) because there are senior lienholders, the IRS would not realize any tax revenue from the levy or liens; (2) the liens have harmed Living Care Utica by preventing refinancing; (3) Medicaid and Medicare funds are exempt from levy; (4) Living Care Utica's inability to pay the taxes is the result of extensive government regulation in the field; (5) the IRS wrongly rejected an offer in compromise; (6) the IRS should have accepted Living Care Utica's plan to maintain the business and sell it as an ongoing concern; (7) the IRS abused its discretion in making a determination to sustain the levy and liens; (8) Living Care Utica's plan to sell the business as an ongoing concern will net more tax revenue; and (9) Living Care Utica contests the underlying tax liability. (Utica J.A. 205-06). As the district court correctly identified, all of the claims presented to it by Living Care Utica, with the exception of the second claim, at least nominally were resolved in *Living Care Alternatives of Utica*, thus satisfying *Montana*'s first requirement. Even though the tax years in these appeals differ from those at issue in *Living Care Utica I/II*, the tax circumstances

which faced Living Care Utica, and the points and defenses raised by Rosser on behalf of it in anticipation of the hearing and pursuant to the statutory provision to raise "any other relevant issue relating to the unpaid tax," 26 U.S.C. § 6330(c)(2)(A), are all matters that are "in substance" the same as those raised in *Living Care Utica I/II*.

As to the first, third, and fourth claims, courts in the prior *Living Care I/II* litigation determined that Living Care Utica's claims failed as a matter of law. *See Living Care Alternatives of Utica*, 411 F.3d at 626, 628 (holding that even if the inability to pay was the result of government regulation, it would not excuse the tax liability and that there is no requirement that the United States consider whether it will receive any revenue from the levy); *Living Care Alternatives of Utica, Inc. v. United States*, No. 03-0359, 2003 WL 23311523, *4 (S.D. Ohio Dec. 12, 2003) (holding that Medicaid and Medicare funds are subject to levy and that even if the inability to pay was the result of government regulation, it would not excuse the tax liability). Therefore, as to the second part of *Montana*'s three-part test, no controlling facts are relevant and collateral estoppel is appropriate for these claims.[2]

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[2] As to the third consideration, "whether other special circumstances warrant an exception to the normal rules of preclusion." *Montana*, 440 U.S. at 155, Living Care Utica points to no special circumstance aside from its general contention that poor congressional public policy in the regulation of nursing homes when balanced with the imposition of tax obligations upon such homes constitutes special circumstances to overlook this Court's prior judgment. This legislative conundrum is not so

As to the fifth, sixth, and eighth claims, this Court previously held that the Appeals Officer had not abused his discretion by refusing the alternatives presented by Living Care Utica because it had previously defaulted under an installment payment plan and it had an escalating amount of unpaid tax liability. *See Living Care Alternatives of Utica*, 411 F.3d at 631. The facts that justified the Officer's prior decision remain unchanged. Therefore, part two of *Montana*'s three-part test is satisfied and so collateral estoppel is also appropriate for these claims.

Living Care Utica's ninth claim in the district court challenged its underlying tax liability. However, Living Care Utica no longer presents this as a direct challenge or issue on appeal to this Court.

As to Living Care Utica's seventh claim - that the IRS abused its discretion in making a determination to sustain the levy and liens - the judgment in *Living Care Alternatives of Utica* arguably relied on different facts than those presented in this case. That is, in previously deciding that the IRS did not abuse its discretion in making the determination to sustain the levy and liens, this Court reviewed the reasoning of that appeals officer's decision. *See id.* at 630. On the one hand, this case presents different decisions rendered by appeals officers not involved in the prior judgment. Whether the appeals officers in *Living Care*

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much presented by Appellant as a special circumstance to except the application of collateral estoppel as it is a basis for asking this Court to legislate specialized tax laws for the nursing home industry, which of course we will not do.

Utica III/IV abused their discretion depends upon the reasoning of these particular officers. In other words, even though the appeals officers arrived at the same ultimate conclusion as the appeals officer in the prior litigation, it is possible that the appeals officers abused their discretion in the reasoning justifying that conclusion. Therefore, in this sense it is inappropriate to apply collateral estoppel.

On the other hand, and as previously discussed, the same decision maker or identity in reasoning (as opposed to identity in the controlling facts or legal principles) is not a required condition to invoke collateral estoppel. Essentially this seventh claim is an all-encompassing one, sweeping within it the various other challenges to the administrative decision raised by Appellant Living Care Utica. Blanket rejection of collateral estoppel amounts to an end run around applying the doctrine to particularized arguments. As a practical matter, in this appeal Living Care Utica has already been collaterally estopped from relitigating arguments upon which it now relies to argue why the appeals officers abused their discretion in determining to sustain the levy and liens. The one exception is that of claim two concerning the refinancing. The district court correctly observed that this claim was not presented in *Living Care Utica I/II*, and so collateral estoppel does not apply. Merits consideration of this claim is set forth below in this decision.

In summary, all but the second claim raised by Living Care Utica are issues that were litigated in *Living Care Utica I/II* and decided by this Court in *Living Care Alternatives of Utica*. They are in

substance the same as issues raised presently by Living Care Utica in *Living Care Utica III/IV*. The controlling facts and/or applicable legal rules remain unchanged, with no special circumstances having been shown to except imposing upon Living Care Utica the determinations for these issues from the prior judgment. Therefore, Living Care Utica's claims on appeal, with the exception of its challenge concerning the refinancing, are barred by the doctrine of collateral estoppel.

2. Living Care Kirkersville

Analyzing whether Living Care Kirkersville is bound by the courts' prior adjudications in *Living Care Utica I/II* gives rise to considerations different from those for Living Care Utica. Living Care Kirkersville presents an identical set of claims in challenging the IRS Appeals Office decision as did Living Care Utica. (Kirkersville J.A. 6-11). In adjudicating Living Care Kirkersville's appeal of the decision, the district court concluded that it was in privity with Living Care Utica. The judge noted, and it is undisputed, that Rosser is the sole shareholder and officer of both Living Care Kirkersville and Living Care Utica and that Rosser represented both companies in the CDP hearings. But Living Care Kirkersville maintains that the district court erred in finding that it was in privity with Living Care Utica and thereby proceeding to apply collateral estoppel principles. And, unlike thedistrict court in *Living Care Utica III/IV*, the district court in *Living Care Kirkersville* applied collateral estoppel to all of the claims, including the second claim concerning the refinancing. This issue was not presented in the prior litigation, and collateral

estoppel should not be applied, as noted by the district court in *Living Care Utica III/IV*. (Utica J.A. 208).

> Collateral estoppel is
>
> "not generally applicable unless there exists either identity or privity between the parties to the relevant litigation. The person being estopped from relitigating an issue must have been either a party to the prior lawsuit or have been so closely related to the interest of the party to be fairly considered to have had his day in court."

Mitchell Inv. Co. v. Fed. Sav. & Loan Ins. Corp.. 741 F.2d 107, 110 n.9 (6th Cir. 1984) (citing *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983)).

Montana suggests that whether one is in "privity" with a prior party so as to be collaterally estopped from relitigating issues is driven by that person's involvement in the prior litigation. In particular, can the interests of common-law adjudication fairly be said to be implicated as to that person; namely, protecting adversaries from the inconvenience and expense of multiple suits, conserving judicial resources, and minimizing the possibility of inconsistent decisions thereby fostering reliance on judicial action, where a party has had a full and fair opportunity to litigate. *Montana*, 440 U.S. at 153-54.

> These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to

> redetermine issues previously resolved. . . . [T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be "strangers to the cause. . . . [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record."

Id. at 154 (quoting *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 487 (1910)). As this Court has previously noted, "'Privity' is an ambiguous term, a shorthand designation for those persons who have a sufficiently close relationship with the record parties to be bound by the judgment." *Vulcan*, 658 F.2d at 1109 (internal quotation and citation omitted).

There are three categories of privity recognized in this Circuit: (1) "*successors in interest* to a party will be bound by a judgment against that party"; (2) "a nonparty who *controlled* the original suit will be bound by the resulting judgment"; or (3) "a nonparty who is *adequately represented* by a party will also be precluded from relitigating the same issues." *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 422 (6th Cir. 1999). The first category does not apply in this case. The Government argues that Living Care Kirkersville's claims are barred by the doctrine of collateral estoppel because it and Living Care Utica are in privity with one another via their shared sole shareholder and officer, Rosser. This basis, which was accepted by the district court in finding privity and applying collateral estoppel, would

seem to be based upon privity under categories two or three.

Under the second category, collateral estoppel is applied to nonparties that "assume[d] control over [the prior] litigation in which they ha[d] a direct financial or propriety interest." *Montana*, 440 U.S. at 154. "Privity exists when there is 'substantial identity' between parties, that is, when there is sufficient commonality of interest. When a person owns most or all of the shares in a corporation and controls the affairs of the corporation, it is presumed that in any litigation involving that corporation the individual has sufficient commonality of interest." *In re Gottheiner*, 703 F.2d at 1140.

In understanding how the second category is applied, this Court in *Becherer* explained that "'[t]o have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review.'" *Becherer*, 193 F.3d at 423 (quoting *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987) (citation omitted)). Examples of relationships providing such sufficient control include "president/sole shareholder and his or her company, a parent corporation and its subsidiary, an indemnitor and its indemnitee, or a liability insurer and an insured." *Id.*

The Government relies upon cases that have held that the owner of a corporation is in privity with the corporation for purposes of collateral estoppel when the owner exercises complete ownership and control of

the corporation. *Mitchell Inv. Co. v. Fed. Sav. & Loan Ins. Corp.*, 741 F.2d at 110 n.9 (referencing *In re Gottheiner*, 703 F.2d at 1139); *Kreager v. Gen. Elec. Co.*, 497 F.2d 468, 472 (2d Cir. 1974) (finding sole shareholder and officer who controlled action involving corporation "had an identity of interest with [the company] and was bound by judgment against it'). But these authorities offered by Appellee do not support the expansion of the concept of privity posed by the Government here. The Government fails to cite authority from this Court or elsewhere that applies collateral estoppel to a legally distinct, nonparty corporation because of a judgment against another similar corporation with which it shares a common sole shareholder/officer. While Rosser may have had sufficient interest in and "control" over the prior Living Care Utica litigation due to his status as its sole shareholder and officer such as to find him in privity with Living Care Utica, that is not the extension of privity that Appellee seeks here. It seeks to extend privity to Living Care Kirkersville, but this separate corporation did not have a direct financial or proprietary interest in nor control over the prior Living Care Utica litigation as is necessary in order to impose privity under the second category.

The other manner of seeking to establish that Living Care Kirkersville is in privity with Living Care Utica is by virtue of their "sister" corporate relationship - mirror business operations via the same owner. This arguably implicates *Becherer*'s third category; that is, binding a nonparty who is adequately represented by a party to the prior litigation, sometimes referred to as "virtual" representation. *See Becherer*, 193 F.3d at 423. This presents the question

of whether privity should be found between corporate entities with similar purposes and common ownership, by posing that the nonparty corporation's interest, via its common ownership and business purposes, was adequately represented in prior litigation by a sister corporation presenting identical issues. Because Living Care Kirkersville was not an uninvolved curious observer of the outcome of the Living Care Utica tax proceedings, application of this third category arguably has some appeal. Living Care Kirkersville is a corporation that owns and operates a mirror image business through the direct, personal efforts of shared sole owner and officer Rosser. The issues and concerns identified and articulated by Rosser on behalf of each corporation are virtually identical.

Becherer describes this third privity category of adequate or virtual representation as requiring "'an express or implied *legal* relationship in which parties to the first suit are *accountable* to non-parties who file a subsequent suit raising identical issues.' [*Benson and Ford*, 833 F.2d at 1175 (emphasis added) (citation omitted). This third category may also be established by a nonparty's express agreement to be bound by or acquiescence to a party's representation. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1980)." *Becherer*, 193 F.3d at 423. In this case, while Rosser serves as the sole owner and officer of both corporations, this fact alone creates neither an express nor an implied legal relationship making Living Care Utica accountable to Living Care Kirkersville. Nor is there any evidence that Living Care Kirkersville expressly agreed to be bound by or acquiesced in Living Care Utica's representation. Certainly,

corporate entities may have an interest in the same legal issue or in proving or disproving similar facts, but this should not be and is not sufficient to establish privity between them, even where they may have common ownership. We will not view the mere fact of common corporate ownership as amounting to an express agreement, particularly given *Becherer*'s caution that "absent an express agreement to be bound, an agreement should not be inferred "'*except upon the plainest circumstances.*'" *Becherer*, 193 F.3d at 423 ((quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 882 (6th Cir. 1997) (emphasis in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 40 cmt. b)). To extend privity to the common ownership of sister corporations present here, without more, also raises due process concerns. Applying privity between commonly-owned corporations requires proof that the nonparty must have been "so closely related to the interest of the party to be fairly considered to have had his day in court." *Mitchell*, 741 F.2d at 110 n.9. It is not reasonable to conclude from this record that this has occurred. The Government would have the court extend privity to Living Care Kirkersville and thereby estop it from having its day in court on the basis that its owner also owns and operates other similar corporations. To do so, without more, is surely an overly broad extension of the concept of privity that could unfairly subject business owners to legal obligations or obstacles without due process, something this Court will not do.

In summary, the Court finds that Living Care Kirkersville lacks sufficient privity with Living Care Utica to apply collateral estoppel from the prior

litigation. Although it is possible that a more careful examination of the interests involved in this case could have demonstrated sufficient commonality of interests, that evidence is lacking in this record. Therefore, in the absence of a presumption of commonality of interest, the fact that Living Care Kirkersville's sole shareholder can be collaterally estopped by prior litigation is insufficient to bind Living Care Kirkersville.

C. Merits Review

The CDP hearing procedure requires that the Appeals Officer verify the IRS has satisfied (1) all legal and procedural requirements to proceed with a levy/lien, (2) consider any defenses and collection alternatives offered, and (3) determine whether the "proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." 26 U.S.C. § 6330(c)(3) (the "balancing test").

Living Care Utica and Living Care Kirkersville both argue that the Appeals Officers abused their discretion in upholding the collection actions against them. As analyzed hereinabove, Living Care Utica is collaterally estopped from presenting all its claims except the claim concerning its ability to refinance. Collateral estoppel does not apply to Living Care Kirkersville's claims, which include the same ability to refinance argument. On appeal to this Court, Living Care Kirkersville also protests that the Appeals Officer, in affirming the tax lien, abused his discretion in conducting the balancing test. It maintains that the

Officer failed to give appropriate weight to the fact that there were other, senior liens to the IRS lien that exceeded receivables, meaning that the IRS would take nothing, and that imposing the lien would essentially close the business, with no resulting funds for the IRS. Living Care Kirkersville further argued on appeal that viable collection alternatives, including sale of the business, refinancing, or an offer in compromise, do exist and were proposed yet not appropriately considered. Finally, it submits that the collection due process hearing system is inherently flawed because there is no recording required, which results in a lack of an adequate administrative record below for effective appellate review.

Living Care Kirkersville's last argument — regarding the informal nature of the proceedings and the lack of a sufficient administrative record — relates to the first factor of the CDP Appeals Officer's duties to ensure all legal and procedural requirements are met.[3] This same argument was also posed by Living Care Utica in cases *Living Care Utica I / II* and rejected by this Court in *Living Care Alternatives of Utica*. Appellant's reliance upon *Mesa Oil, Inc. v. United States*, 86 A.F.T.R.2d 7312 (D. Colo. 2000) is misplaced, given the distinctions in the notice of determination in that case compared with those in

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[3] Arguably also included as part of this first factor is Living Care Kirkersville's argument on appeal that courts have rendered meaningless Congress's intent in enacting the Tax Reform Act; that is, to curb the excesses of the IRS. This policy argument is more appropriately left for Congress to consider, not us. *See* footnote 2.

these appeals. The notice in *Mesa Oil* contained no factual details, legal analysis, or discussion of the balancing test. *Id.* at 7315-16. As this Court previously noted, "*Mesa Oil*'s remand is an exception to the general practice of reviewing courts showing deference to the Appeals Officers' conclusions regarding the balancing analysis." *Living Care Alternatives of Utica*, 411 F.3d at 627-28. While the lack of a formal administrative record could make abuse of discretion review problematic, given the historically broad discretion in tax collection proceedings, appropriate due process is afforded unless the reviewing court is "convinced that the type of taxpayer abuse that Congress sought to remedy has occurred in the case." *Id.* at 629. As in *Living Care Alternatives of Utica*, the Notices of Determination here fall short of the exceptional circumstances presented in *Mesa Oil* and "provide a sufficient basis for an abuse of discretion review, as that standard is applied in tax levy and lien appeals." *Id.*

The second and third factors addressed by the Appeals Officer can be reviewed together, given that the assessment and viability of proposed collection alternatives dovetails into consideration of whether the collection action is no more intrusive than necessary. Living Care Kirkersville argues that the Appeals Officer abused his discretion because he did not include the existence of senior lienholders in the balancing analysis and failed to consider that the net effect of the lien would be to shut down the business without generating any tax revenue for the Service. The Government counters that the district court properly concluded that the Appeals Officers did not abuse their discretion because the IRS is not required

to consider whether it will receive revenue from the collection or whether the collection will negatively impact the taxpayer's business.

As this Court has noted, there is little about this requirement in Sixth Circuit case law and, in most cases, a reviewing court affirms the Appeals Officer's determination that the balancing test was correctly applied. *Living Care Alternatives of Utica*, 411 F.3d at 627. Current case law supports the Government's argument that the IRS is not required to include in its balancing analysis whether it "will receive any revenue from a levy or sale, or whether the business will have to close down due to the levy and sale." *Living Care Alternatives of Utica*, 411 F.3d at 628; *Medlock v. United States*, 325 F. Supp. 2d 1064, 1079 (C.D. Cal. 2003) (holding that the appeals officer was not required to consider the impact of a levy on the taxpayer's customers).

Appellants also complain that the Appeals Officers abused their discretion by preventing them from refinancing so as to pay the taxes, not allowing them to conduct a private sale to maximize proceeds, or refusing to accept an offer in compromise. The Appeals Officers reviewed each of these contentions, and it cannot be said that their rejection of each as a collection alternative was irrational or unreasonable. Each proposed alternative was presented by Appellants in general terms only, lacking the requisite specificity to permit the Appeals Officers to give informed consideration. Offers in compromise require specific, detailed submissions, which was not done by Appellants. Withdrawing liens as a prerequisite to refinancing was only presented by Appellants as being

required by their particular bank, with no details about the rate and return to the IRS if the refinancing were provided. Nor did Appellants address whether refinancing was actually available, given that other liens would still be in place. Any expected increased revenue and return to the IRS from permitting a private sale were also not provided. As the Appeals Office noted, if the tax liens were to be withdrawn, given the particular circumstances of these taxpayers, the IRS would be placed in a precarious situation with respect to competing creditors and collection of any of the unpaid taxes.

The aforementioned consideration, deliberation, and conclusions by the Appeals Officers do not evidence the "abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS." *Living Care Alternatives of Utica*, 411 F.3d at 631. That Appellants disagree with the results from the exercise of the Appeals Officers' discretion does not correlate with that discretion thereby being abused. To second-guess the considerations and rationale articulated by the Officers necessitates delving into the details of tax enforcement that reviewing courts should not do, as explained by this Court in *Living Care Alternatives of Utica*.

III. CONCLUSION

For the reasons stated, the decisions of the district courts upholding the Appeals Office's Notices of Determination are **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case Nos. 2:03-cv-717, 2:03-cv-1209

[Filed November 14, 2005]

LIVING CARE ALTERNATIVES, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant.

MEMORANDUM & ORDER

This matter is currently before the Court on Defendant's motion for summary affirmance of the IRS collection due process determination in Case No. 2:03-cv-717 (Record at 13), and on Defendant's motion for summary affirmance of the IRS administrative decision and for dismissal of Count 9 of the Complaint in Case No. 2:03-cv-1209 (Record at 13). For the reasons stated below, the Court grants both motions.

I. Background and Procedural History

Plaintiff Living Care Alternatives of Utica, Inc. ("Living Care") operates a small nursing home funded primarily with Medicaid and Medicare payments. Because its costs are greater than its revenues, it has fallen behind in paying federal withholding employment taxes. Deficiencies date back many years and Plaintiff currently owes the Internal Revenue Service ("IRS") more than $400,000.00.

Over the years, the IRS has sent Plaintiff numerous notices of liens and notices of intent to levy. At Plaintiff's request, collection due process hearings were held with respect to each contested notice. In each case, an IRS Appeals Officer sustained the tax levies and liens. Plaintiff now seeks judicial review, pursuant to 26 U.S.C. § 6330(d)(1)(B), of two of those adverse determinations. Case No. 2:03-cv-717 ("Living Care III") concerns a determination letter dated July 3, 2003 with respect to tax periods ending December 2001, March 2002, and December 2002. Case No. 2:03-cv-1209 ("Living Care IV") concerns a determination letter dated November 24, 2003 with respect to the tax period ending June of 2002.

The complaints filed in Living Care III and IV are nearly identical, the only significant difference being the fact that Living Care III involves both a levy on receivables and a lien on the real property, and Living Care IV involves only a lien on the property. In each case, Plaintiff argues that the liens and levy should not be sustained because they are "overbearing and intrusive, designed to shut down the business, and would not lead to the collection of taxes or the

maximum amount of tax that could be collected." The arguments contained in the two complaints may be summarized as follows:

Count One: Because there are senior lienholders, Defendant would not realize any tax revenue from the levy or liens;

Count Two: The liens have harmed Plaintiff by preventing refinancing;

Count Three: Medicaid and Medicare funds are exempt from levy;

Count Four: Plaintiff's inability to pay the taxes is the result of extensive government regulation in the field of Medicaid and Medicare;

Count Five: The IRS wrongly rejected an offer in compromise;

Count Six: The IRS should have accepted Plaintiff's plan to maintain the business and sell it as an ongoing concern;

Count Seven: The IRS abused its discretion in making a determination to sustain the levy and liens;

Count Eight: Plaintiff's plan to sell the business as an ongoing concern will net more tax revenue; and

Count Nine: Plaintiff contests the underlying tax liability (Living Care IV only).

The two above-captioned cases, Living Care III and IV, are not the only ones Plaintiff has filed. In fact, it has sought judicial review of several IRS determinations. The first suit, Case No. 2:02-cv-717 ("Living Care I"), was assigned to Judge Sargus. The second suit, Case No. 2:03-cv-359 ("Living Care II"), was assigned to Judge Frost. Another suit, Case No. 2:03-cv-922, was assigned to the undersigned judge but later dismissed as duplicative of Living Care III. More recently, a related entity, Living Care Alternatives of Kirkersville, Inc., sought judicial review of another adverse determination in Case No. 2:04-cv-293, assigned to Judge Sargus.

In Living Care I and Living Care II, Judge Sargus and Judge Frost granted summary judgment in favor of Defendant, holding that the IRS had not abused its discretion in sustaining the tax levies and liens. Plaintiff appealed both of those decisions to the Sixth Circuit Court of Appeals. At the time, the undersigned judge had not yet ruled on Defendant's motions for summary affirmance of the IRS collection due process determinations in Living Care III and Living Care IV. Because the issues raised in the cases on appeal appeared to be substantially the same as those raised in Living Care III and IV, the Court stayed all proceedings in those cases pending a decision by the Sixth Circuit.

On June 2, 2005, the Sixth Circuit affirmed the district court opinions in Living Care I and II. *See Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005). Like the district court, the Sixth Circuit found no abuse of discretion by the IRS Appeals Officers. At the Court's request, the

parties have filed supplemental briefs concerning the legal effect of the previous district court and Sixth Circuit opinions on the pending motions in Living Care III and IV.

II. Discussion

In the Court's view, the only real issue at this point in the litigation is whether the doctrine of collateral estoppel bars Plaintiff's claims. The doctrine of collateral estoppel provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). The doctrine applies when:

> (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue.

Wolfe v. Perry, 412 F.3d 707, 716 (6th Cir. 2005)(*citing Santana-Albarran v. Ashcroft*, 393 F.3d 699, 704 (6th Cir. 2005)).

While Plaintiff is correct that the doctrine of collateral estoppel has sometimes been narrowly applied in tax cases, the Supreme Court has held that it is applicable "where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). This is true even if the suits concern different tax years. *Id.* Plaintiff contends that the doctrine of collateral estoppel should not bar its claims in Living Care III and IV because those suits seek judicial review of different determination letters written by different Appeals Officers. In the Court's view, however, the controlling facts, the issues raised by Plaintiff, the applicable legal rules, and the Appeals Officers' analyses are similar enough to those at issue in Living Care I and II that no inequity results from the application of the doctrine of collateral estoppel.[1]

After carefully reviewing the district court opinions and the Sixth Circuit opinion in Living Care I and II, and the administrative record, briefs, and other materials submitted by the parties in Living Care III and IV, the Court concludes that the doctrine of collateral estoppel bars the vast majority of Plaintiff's

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[1] The Court notes that, on August 29, 2005, Judge Sargus granted the United States' motion for summary affirmance in *Living Care Alternatives of Kirkersville, Inc. v. United States*, Case Number 2:04-cv-293, based, in part, on grounds of collateral estoppel. He held that because that Living Care facility was in privity with Living Care Alternatives of Utica, Inc., the prior decisions in Living Care I and II barred Plaintiff's claims. Plaintiff has appealed that ruling.

claims. There is no question that Plaintiff was a party to the prior litigation. Furthermore, there is no doubt that the issues raised by Plaintiff in Counts One, Three, Four, Five, Six, Seven, Eight, and Nine of its complaints in Living Care III and IV are identical to issues resolved by the district court and/or by Sixth Circuit in Living Care I and II. Those issues were actually litigated and decided in those cases, and resolution of those issues was necessary and essential to a judgment on the merits in each case. Because Living Care has had a full and fair opportunity to litigate those issues, it is barred from re-litigating them.

Only Count Two of each complaint raises an issue not directly addressed by either the district court or the Sixth Circuit. In each case, Plaintiff alleges that it "has been harmed by the federal tax lien. The lien has prevented the refinancing of the real and personal property. The lien has caused difficulties for Plaintiff." It appears that Plaintiff suggested, as a collection alternative, that if the liens were removed, it could refinance the property and use the additional money to pay the tax deficiencies.

Both Appeals Officers considered this argument and concluded that Plaintiff had not met any of the criteria set forth in 26 U.S.C. § 6323(j)(1) to justify the

withdrawal of the notices of federal tax liens.[2] In the determination letter at issue in Living Care III, the Appeals Officer concluded that "the taxpayer does not provide the information needed to evaluate the proposed collection alternative." In the determination letter at issue in Living Care IV, the Appeals Officer concluded that "the taxpayer failed to submit sufficient documentation to support that the lien withdrawal would facilitate the collection of the taxes."

Because Plaintiff did not challenge the underlying tax liability, the Court reviews the Appeals Officers' decisions for an abuse of discretion. *See Living Care*,

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[2] Those criteria are set forth as follows:

> The Secretary may withdraw a notice of a lien filed under this section and this chapter shall be applied as if the withdrawn notice had not been filed, if the Secretary determines that--
>
> (A) the filing of such notice was premature or otherwise not in accordance with administrative procedures of the Secretary,
> (B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the lien was imposed by means of installment payments, unless such agreement provides otherwise,
> (C) the withdrawal of such notice will facilitate the collection of the tax liability, or
> (D) with the consent of the taxpayer or the National Taxpayer Advocate, the withdrawal of such notice would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.

26 U.S.C. § 6323(j)(1).

411 F.3d at 625.[3] There is no evidence in the record to support a finding that removing the liens and refinancing the property would have facilitated the collection of the tax liability. The Court therefore concludes that the Appeals Officers did not abuse their discretion in rejecting Plaintiff's request for a withdrawal of those liens, which were clearly necessary to protect the IRS's interest in collecting the taxes owed. As the Sixth Circuit noted:

> the government is not required to continue subsidizing failing businesses by foregoing tax collection. Any other conclusion would create a bizarre tax system with perverse incentives for businesses to maintain themselves on the edge of insolvency in order to enjoy immunity from tax enforcement.

Id. at 628.

III. Conclusion

For the reasons set forth above, the Court concludes that all of Plaintiff's claims except Count II of each complaint filed in the above-captioned cases are barred by the doctrine of collateral estoppel. With respect to Count II of each complaint, the Court concludes that the IRS Appeals Officers did not abuse

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[3] The question of whether Plaintiff challenged the underlying tax liability at the due process hearings was addressed in the Sixth Circuit's opinion. Because the Sixth Circuit found that Plaintiff's arguments did not constitute challenges to the underlying tax liability, Plaintiff is estopped from arguing otherwise.

their discretion in refusing to remove the tax liens so that Plaintiff could refinance the property in question.

The Court therefore **GRANTS** Defendant's motion for summary affirmance of the IRS collection due process determination in Case No. 2:03-cv-717 (Record at 13), and Defendant's motion for summary affirmance of the IRS administrative decision and for dismissal of Count 9 of the Complaint in Case No. 2:03-cv-1209 (Record at 13). The Clerk is directed to enter judgment in favor of Defendant in both cases.

IT IS SO ORDERED.

Date: November 14, 2005

/s/
John D. Holschuh, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. 2:04-cv-293

[Filed August 29, 2005]

LIVING CARE ALTERNATIVES OF KIRKERSVILLE, INC., Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, Defendant.	)

OPINION AND ORDER

This matter is before the Court for consideration of the United States of America's Motion for Summary Affirmance of the Administrative Decision of the Internal Revenue Service. (Doc. #10). For the reasons that follow, the motion is granted.

I.

Plaintiff, Living Care Alternatives of Kirkersville, Inc. ["Plaintiff"], brings this action pursuant to 26 U.S.C. § 6330(d), seeking judicial review of an Internal Revenue Service administrative decision made following a collection due process hearing. Plaintiff, a long-term care nursing facility operating in Licking County, Ohio, challenges federal tax liens placed on Plaintiff's property by the Defendant Internal Revenue Service ["IRS"]. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

As a provider of long-term nursing care, Plaintiff's primary source of funding derives from Medicaid payments. (*Complaint* at ¶ 4). Plaintiff states that because Medicaid payments are made in arrears, the rate "does not reimburse for payment for prior year's obligations and does not recognize allowance of a profit." (*Id.* at ¶¶ 13-14). This payment system has allegedly contributed to Plaintiff's failure to pay or to timely pay federal withholding taxes for its employees during various tax periods. As a result, the IRS has placed liens on Plaintiff's property. Plaintiff has challenged the actions of the IRS and collection due process hearings have been held at the administrative level. Plaintiff has filed appeals from the decisions rendered by the IRS Appeals Officer as to the various liens. The instant action involves the third such appeal by Plaintiff in this court[1].

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[1] *See Living Care Alternatives of Utica, Inc. v. United States of America, Internal Revenue Service*, 2:02-CV-717 (Judge Sargus) and *Living Care Alternatives of Utica, Inc. v. United States of*

At issue in this case is the IRS decision with respect to Plaintiff's failure to pay federal withholding employment taxes for quarterly periods beginning March 31, 2000, June 30, 2000, September 30, 2000, December 31, 2000, and March 31, 2001. Also at issue is the IRS decision with respect to Plaintiff's failure to pay unemployment insurance taxes for the period ending December 31, 2000. Plaintiff alleges that the Appeals Officer "erred in concluding that the lien is no more intrusive than necessary" and that the lien will provide "the most efficient method of tax collection." (*Complaint* at ¶¶ 19-20). According to Plaintiff, the IRS liens are "overbearing and intrusive [and are] designed to shut down the business . . . ." (*Id.* at ¶ 27).

With respect to balancing the need for efficient collection of taxes and the taxpayer's concern that the collection action be no more intrusive than necessary, the Appeals Officer stated:

> [A]ny concern the taxpayer may have about the intrusiveness of the notice of lien does not overcome the need for the efficient collection of the taxes. The refusal of the taxpayer's bank to extend additional loans or refinancing based on the presence of a notice of lien is a matter to be resolved between the taxpayer and it's [*sic*]

America, Internal Revenue Service, 2:03-CV-359 (Judge Frost). The decisions reached in these cases were consolidated on appeal. On June 2, 2005, the decisions of this court were affirmed by the Sixth Circuit, *Living Care Alternatives of Utica, Inc. v. United States of America, Internal Revenue Service*, 411 F.3d 621 (6th Cir. 2005).

> bank. There are other notices of lien filed with regard to unpaid tax liabilities other than the CDP [collection due process] periods. Therefore, even if the notice of lien at issue in this case was withdrawn, other notices of lien would still exist. Removal of all notices of lien would place the government in a precarious situation with respect to competing creditors and would place collection of any of the unpaid taxes in peril. Finally, Mr. Rosser [Plaintiff's corporate representative] did not offer an alternatives [*sic*] to the notice of lien that would provide for the efficient collection of the taxes and also be less intrusive on the taxpayer.

(Exhibit 1 at 6, attached to *Complaint*).

With this background in mind, the Court proceeds to consider the Motion of the United States for Summary Affirmance of the IRS decision.

II.

The standard of review applicable in this case has been resolved by the Sixth Circuit's opinion in *Living Care Alternatives of Utica, Inc. v. United States of America, Internal Revenue Service*, 411 F.3d 621 (6th Cir. 2005). There, the court of appeals affirmed two decisions of this court applying an abuse of discretion standard to appeals of collection due process hearings

under 26 U.S.C. § 6330(d), where the underlying tax liability is not challenged[2].

As the Sixth Circuit observed, the relevant provision of the IRS Code requires that the Appeals Officer decide "'whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the [taxpayer] that any collection action is no more intrusive than necessary.'" *Id.* at 627, quoting 26 U.S.C. § 6330(c)(3)(C). In applying this standard, the Sixth Circuit considered three arguments raised by Plaintiff as to alleged abuse of discretion on the part of the Appeals Officers. The court ultimately found no abuse of discretion at the administrative level.

In the case at bar, Plaintiff first argues that *de novo* review applies because Plaintiff challenges the underlying tax liability. In the alternative, Plaintiff argues that the Appeals Officer's decision was an abuse of discretion because the impact of senior liens and the value of Plaintiff's property were allegedly

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[2] In contrast, *de novo* review applies when the underlying tax liability itself is challenged. In this regard, the Sixth Circuit held that a challenge to tax liability "requires more than . . . [p]assionately arguing that it is bad public policy to tax a nursing home that was trying in good faith to comply with a comprehensive regulatory scheme. . . ." 411 F.3d at 627. In addition, the court held that a request that the district court "remove" tax liability "seems to be admitting [the liability] was valid and then requesting that payment be excused" and thus, does not amount to a challenge to underlying liability. *Id.*

ignored in the balancing analysis[3]. In response, the Defendant argues that *de novo* review is not appropriate and that the decision of the Appeals Officer should be affirmed under an abuse of discretion standard. Defendant further argues that the doctrine of collateral estoppel precludes Plaintiff from pursuing the instant claims.

III.

The Court will consider the issue of collateral estoppel first. The doctrine of collateral estoppel applies when:

> (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with

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[3] Plaintiff also argues that the Defendant's failure to file an Answer in this case renders its Motion for Summary Affirmance "procedurally inappropriate." (Memorandum *contra* at 2). The Court disagrees. In the Plaintiff's previous case before the undersigned, the Court noted that Motions for Summary Judgment make little sense in the context of reviewing an administrative decision. Rather, a motion seeking either reversal or affirmance of the administrative decision is the proper procedure to invoke. Defendant in this case styled its motion as one for "Summary Affirmance" of the IRS decision. Since the Defendant did not file an Answer, the Court treats the motion as similar to one made pursuant to Fed. R. Civ. P. 12(b).

> such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue.

Verizon North, Inc. v. Strand, 367 F.3d 577, 583 (6th Cir. 2004), quoting *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999).

The Defendant argues that, in the context of tax law, collateral estoppel precludes the relitigation of matters that are identical to earlier litigated matters but for a differing tax year. The Defendant relies on *Commissioner v. Sunnen*, 333 U.S. 591 (1948), in which the Supreme Court stated:

> [I]f a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit. Collateral estoppel operates, in other words, to relieve the government and the taxpayer of 'redundant litigation of the identical question of the statute's application to the taxpayer's status.' But collateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial

variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. If the legal matters determined in the earlier case differ from those

> raised in the second case, collateral estoppel has no bearing on the situation. And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive.

Id. at 597-600 (internal citations omitted).

According to the Defendant, collateral estoppel applies to Plaintiff's present claims because the arguments and the factual scenario are the same as in the earlier cases before this Court, except for the differing tax years involved. Plaintiff opposes application of the doctrine on the basis that the prior cases involved Living Care Alternatives of Utica, Inc., not Living Care Alternatives of Kirkersville, Inc. In response, Defendant states that there is privity between the entities as both share the same corporate shareholder and principal officer, Mr. Thomas J. Rosser.

A review of the record in this case reveals that, with the exception of the tax years, the same issues raised herein were raised and addressed in the earlier actions before this Court. In addition, since Plaintiff shares the same corporate shareholder and principal officer as Plaintiff Living Care of Utica, Inc., privity is established. As s result, the Court finds that the doctrine of collateral estoppel serves to preclude Plaintiff in this case fiom relitigating the issues raised in this action for a third time.

In any event, even absent the doctrine of collateral estoppel, the Court finds that the Appeals Officer's decision to uphold the IRS collection action was not an

abuse of discretion[4]. As in the earlier suits before this Court, Plaintiff argues that the Appeals Officer abused his discretion by allegedly ignoring the effect the tax lien will have on Plaintiff's business. The Appeals Officer found that the Plaintiff's concern as to intrusiveness of the lien did not overcome the need for the efficient collection of taxes. As the Appeals Officer observed, removal of the lien would "place the government in a precarious situation with respect to competing creditors and would place collection of any of the unpaid taxes in peril." (Exhibit 1 at 6 attached to *Complaint*). Furthermore, the Appeals Officer found that no less intrusive method was offered by Plaintiff that would also provide for the efficient collection of taxes. Nothing in the record supports Plaintiff's argument that this decision was made without rational explanation or was founded on some impermissible basis. Thus, Plaintiff's appeal to this Court is without merit.

IV.

In light of the foregoing, the Motion of the United States for Summary Affirmance of the Decision of the IRS (Doc. #10) is GRANTED. The Clerk is DIRECTED to enter Judgment in favor of the Defendant and close this case.

IT IS SO ORDERED.

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[4] The Court rejects Plaintiff's argument that *de novo* review applies. The arguments raised by Plaintiff do not go to the validity of the underlying tax liability. As the record reveals, Plaintiff does not dispute its nonpayment of taxes.

8-29-2005
DATE

/s/
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-02-717

[Filed March 22, 2004]

LIVING CARE ALTERNATIVES OF UTICA, INC., Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, Defendant.	)

OPINION AND ORDER

This case was initiated by Plaintiff (Living Care) filing a document entitled "Complaint for Redetermination of Notice of Intent to Levy and Appeal of Defendant's Sustaining of Levy and Appeal of Liability." Doc. 1, Comp., Title. Asserting this Court's jurisdiction pursuant to 26 U.S.C. §6330(d)(1)(B), Living Care says in effect that it is appealing "an adverse determination by the Internal Revenue Service ... at a due process hearing under Sec.

6320 of the Internal Revenue Code [IRC] ... as to the appropriateness of a filed Notice of Federal Tax Lien ... and under IRC Sec. 6330 as to the appropriateness of the Notice of Levy." Doc. 1, Comp., ¶¶ 1, 5, and Attachment One. The liens and levies in question relate to Living Care's failure to pay or pay timely all its federal withholding taxes[1] due for various periods between 1995 and 2001. *Id.* Living Care says it seeks to have its subject tax liabilities "removed," to have the subject "determination of the due process hearing be reversed," that the liens and levies "not be sustained," and that the "collection effort cease." Doc. 1, Comp., p. 8.

Defendant IRS has moved under Rule 12(b), Fed. R. Civ. P., for dismissal of that portion of Living Care's Complaint respecting the filing of the subject tax liens, essentially on the grounds that the Court lacks subject matter jurisdiction because that portion its ruling is not subject to appeal under the statutes relied on and the Defendant otherwise enjoys sovereign immunity. Doc. 8, pp. 1, 7-10. At the same time, the IRS has also moved under Rule 56, Fed. R. Civ. P., for summary judgment as to the remainder of the Complaint, asserting that there is no genuine issue of material fact and that it, the IRS, is entitled to judgment as a matter of law. *Id.*, pp. 1, 10-13. The case is now before the Court on this dual motion, Plaintiff Living Care's memorandum contra (Doc. 9.), and Defendant's reply

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[1] These appear to involve either or both employee F.I.C.A. and/or income tax withholding, both of which Living Care, as an employer, is bound to collect and pay over pursuant to 26 U.S.C. §§ 3102 and 3403, respectively

memorandum (Doc. 10), together with the pleadings and other undisputed materials submitted by one or the other of the parties.

Request for Oral Argument

Relative to the above motions the Court has also received Living Care's Request for Oral Hearing (Doc. 17). Southern District of Ohio Civ. R. 7.1(a) provides that motions such as the above, expressly including those under Rule 56, shall be decided based on memoranda "and without oral hearings unless ordered by the Court." From the content of Living Care's request, it appears that what it seeks is an opportunity for oral argument rather than an evidentiary hearing. In such case, Rule 7.1(b)(2) provides for scheduling the same upon request if deemed by the Court "essential to the fair resolution of the case because of its public importance or the complexity of the factual or legal issues presented."

In this case, the Court does not consider that any of the above factors are present in such degree as to warrant departure from the normal procedure. The Rule 12(b) issue appears clear and not difficult to resolve on the pleadings and written arguments of the parties, in large part because Plaintiff does not assert or argue that this Court has jurisdiction other than under 26 U.S.C. §6330(d)(1)(B). Further, the Rule 56 motion for summary judgment issues have already been fully considered and decided against this same Plaintiff by another branch of the court in a separate

case[2] on pleadings virtually identical to those in this case except for the dates of the IRS's levies and lien actions involved. This Court will therefore decline Plaintiff's request and proceed to decide Defendant's combined motions without scheduling oral argument.

The Motion to Dismiss

Defendant IRS does not specify whether its motion to dismiss is made under Rule 12(b)(1), lack of subject matter jurisdiction, or Rule 12(b)(6), failure to state a claim upon which relief can be granted. It is generally recognized, however, that Rule 12(b)(1) is the appropriate vehicle for a court's consideration of claims that are asserted to be untimely or barred by sovereign immunity. See *Gervasio v. United States,* 627 F.Supp. 428, 430 (N.D. Ill. 1986); *Cleveland v. Secretary of Health and Human Services*, 1993 WL 321755 *2 (N.D. Ill. Aug. 19, 1993) (noting also that where lack of subject matter jurisdiction is asserted along with other grounds for dismissal, the Rule 12(b)(1) challenge is properly considered first); *Porter v. Board of Trustees of Manhattan Beach*, 123 F.Supp.2d 1187, 1194 (C.D. Cal. 2000) *rev'd on other grounds*, 307 F.3d 1064. Furthermore, the Court is bound to examine the question of its subject matter jurisdiction, in any event. See *Morrison v. Morrison*, 408 F.Supp. 315, 316 (N.D. Tex. 1976); *Lacy v. Dayton Board of Education*, 550 F. Supp. 835, 843 (S.D. Oh. 1982).

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[2] *Living Care Alternatives of Utica, Inc. v. United States of America Internal Revenue Service*, Case No. C2-03-359, Opinion and Order by Hon. Gregory L. Frost, Jan. 12, 2004.

> ... The Sixth Circuit recognizes two types of 12(b)(1) motions: a "facial" attack challenging the sufficiency of the plaintiff's factual allegations, in which all well-pleaded factual allegations in the complaint are taken to be true; and a "factual" attack challenging the actual fact of subject- matter jurisdiction, which is analyzed under Fed. R. Civ. P. 56 standards .... The difference is often significant, because under a factual challenge the district court is empowered to weigh evidence, and no presumptions apply as to the truthfulness of plaintiffs allegations .... The Sixth Circuit has clearly recognized that a district court is empowered [to] consider evidence beyond the pleadings and to resolve factual disputes when necessary to resolve challenges to subject-matter jurisdiction under Rule 12(b)(1).

Gillett v. United States, 233 F.Supp.2d 874, 877 (W.D. Mich. 2002) (citations omitted).

The United States and its agencies are immune from suit under the doctrine of sovereign immunity and may be sued only to the extent that such immunity has been waived. See *United States v. Mitchell*, 445 US. 535, 538 (1980); *United States v. Dalm*, 494 U.S. 596, 608 (1990). Further,

> .... [a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, see, *e.g. United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992), and will not be implied, *Irwin v. Department of Veterans Affairs*, [498 US. 89]

> at 95. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. See, *e.g., United States v. Williams,* 514 U.S. 527, 431 (1995) (when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court will "construe ambiguities in favor of immunity."); *Library of Congress v. Shaw,* 478 U.S. 310, 318 (1986); *Lehman v. Nakshian,* 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied).

Lane v. Pena, 518 U.S. 187, 192 (1996) (parallel citations omitted); See also *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

In this case, the Court need look no further than the pleadings, Defendant's motion with its exhibits, and Plaintiff' response to determine that in fact it does not have subject matter jurisdiction to review the ruling of the IRS with respect to the notice of tax liens dated May 24, 2001. The dates and nature of various documents relative to the tax liens and the levies thereon that are the subject of this case are set out and supported in numbered paragraphs 1 through 8 and referenced exhibits in the Facts statement of Defendant's memorandum. Doc. 8, pp. 2-3. In addition, Plaintiff's response memorandum expressly concedes: "The factual outline by Defendant in items 1 through 8 (Memorandum, p. 2) is accurate in its recitation of the dates of the notices of the filings etc." With respect to the May 2001 Notice of Federal Tax

Liens, the above establish that Plaintiff did not request a Collection Due Process hearing from the IRS, as provided for in 26 U.S.C. §6320(a)(3)(B) and 26 C.F.R. 3301.6320-1(b), until late September, well past the 30 days permitted by the statute and regulation for such a request. Plaintiff's September request for hearing (Doc. 8, Ex. C) thus resulted in what is termed an "equivalent hearing" (see 26 C.F.R. 5301.6320-1(i)) respecting the May liens notice; but that is a hearing provided only by the IRS regulations, not the statute. Hence, the results of such an equivalent hearing (see Decision Letter dated June 21, 2002, Doc. 8, Ex. E) are not within the statute's limited waiver of sovereign immunity that permits the results of a statutory Collection Due Process hearing to be appealed. 26 U.S.C. §§ 6320(c) and 6330(d)(1); see *Johnson v. Commissioner of Internal Revenue*, 2000 WL 1041191 *2 (D. Or. June 21, 2000); *Fabricius v. United States*, 2002 WL 31662301 *2 (E.D. Cal. Oct. 18, 2002).

The Court therefore concludes that it does not have subject matter jurisdiction to review the results of Plaintiff's equivalent hearing respecting Notice of Federal Tax Liens against Living Care dated May 21, 2001 (Doc. 8, Ex. A), as expressed in Defendant IRS's Decision Letter dated June 21, 2002. Doc. 8, Ex. E. Consequently, the Defendant's motion to dismiss that portion of the Complaint seeking such review and/or other action by the Court respecting the filing of those liens will be granted.

The Motion for Summary Judgment

In contrast to the situation discussed above respecting filing of the tax liens against Living Care in

May 2001, the Court finds that it does have subject matter jurisdiction to review the results of the statutory Collection Due Process hearing granted with respect to the IRS's Notices of Intent to Levy dated August 22 and September 5, 2001. Notice of Determination, Doc. 8, Ex. G. It is not disputed that Plaintiff filed this appeal within the time permitted by 26 U.S.C. §6330(d), and because social security and withholding taxes are involved here, this Court rather than the Tax Court has jurisdiction of an appeal under that section. See *Berkey v. Department of the Treasury*, 2001 WL 1397680 *2 (E.D. Mich. 2001). The Court thus concludes that it may proceed to consideration of the remainder Defendant IRS's motion.

The procedure for considering whether summary judgment is appropriate is set forth in Federal Rule of Civil Procedure 56(c) as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Although useful in resolving many cases without the necessity of trial, it has also been recognized that the above rules provision is not well suited to carrying out the review of agency action required in this type of case. "Such a motion is designed to isolate factual issues on which there is no genuine dispute . . . [a]gency action, however, is reviewed not tried." *Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.*

880 F.Supp. 1370, 1374 (D.Colo. 1995). As pointed out by Chief Judge Covello of the District of Connecticut:

> "[A] motion for summary judgment under rule 56 of the Federal Rules of Civil Procedure . . . makes no procedural sense when a district court is asked to undertake judicial review of agency action." *Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.* 880 F.Supp. 1370, 1374 (D. Colo. 1995); see also *Olenhausen v. Commodity Credit Corp.*, 42 F.3d 1560, 1579-80 (10th Cir. 1994) (expressly disapproving use of summary judgment procedure in cases where a court is reviewing an administrative action); *CDI Information Services, Inc. v. Reno*, 101 F. Supp.2d 546, 547 (E.D. Mich. 2000) (construing the parties summary judgment memoranda as a motion and a cross-motion for judgment); *Orfanos v. Department of Health and Human Services*, 896 F.Supp. 23, 26 (D.D.C. 1995).

MRCA Information Services v. United States, 145 F.Supp.2d 194, 195 (D. Conn. 2000). This Court will therefore follow the procedure employed by the Eastern District of Michigan in *CDI Information Services*, cited above, and treat the summary judgment memoranda here as cross-motions for judgment on the pleadings seeking either reversal or affirmance of the administrative agency's decision.

Section 6330 does not establish a standard of review for the appeals to court it authorizes from IRS Collection Due Process rulings. In this situation, courts have generally been guided by a portion of that section's legislative history that states:

> .... Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion. In such cases, the appeals officer's determination as to the appropriateness of collection activity will be reviewed using an abuse of discretion standard.

Rep. No. 105-599 at 266 (1988); see *Stop-26 Riverbend, Inc. v. United States of America*, 2003 WL 1908747 *1 (S.D. Oh. March 12, 2003) and cases there cited; see also *Dudley's Commercial and Industrial Coating, Inc. v. U. S. Internal Revenue Service*, 292 F.Supp.2d 976, 985 (M.D. Tenn. 2003); *Bonfante v. United States*, 2002 WL 373407 *5 (S.D. Oh. Jan 29, 2002).

In this case, Living Care contends that it did challenge the underlying tax liability and, therefore, this Court's review should be *de novo* (Doc. 9, p. 12), citing *Dogwood Forrest Rest Home v. United States*, 181 F.Supp.2d 554 (M.D. N.C. 2001), among others. Conceding for the purposes of this argument that *de novo* would be the appropriate standard of review for an administrative determination respecting the validity of the underlying tax liability, the Court finds that is not the situation in this case. Living Care argues otherwise and points out that its Complaint asks for the underlying tax liability to be removed. For reasons discussed above, however, the Complaint does not determine the nature or extent of this appeal. "The scope of th[e] court's review under ¶ 6330(d) is limited to issues properly raised and considered during the collection due process hearing." *Jewett v. Commissioner of Internal Revenue*, 292 F.Supp.2d 962, 966 (N.D. Oh. 2003). "In its review of the agency's

exercise of discretion, the Court is limited to a review of the administrative record"[3] *(Dudley's Commercial and Industrial Coating, Inc.*, at 985 (citing *Camp v. Pitts*, 411 US. 138, 142 (1973)), and the record here shows clearly that the validity of the underlying taxes was not at issue before the IRS appeals officer (AO) below.

As it was in the companion to this case noted above (Case No. C2-03-359 decided by Judge Frost), the Complaint here in effect makes clear that the underlying tax liability was not being challenged in the proceedings below. "Plaintiff was unable to pay or pay timely all federal withholding taxes." Comp., Doc. 1, ¶ 5. "Plaintiff presented its explanation for its inability to pay taxes ...." *Id.*, ¶ 7. Further, as Defendant points out, a central point of both Plaintiffs complaint here and its request for the collection due process hearing below (Doc. 8, Exs. C, H) is an explanation of why it has been, and in part continues to be, unable to pay all its withholding tax liabilities. There is no attack on the validity of any of those liabilities. Nor does the Notice of Determination respecting the IRS's intent to file tax levies, which is the ruling actually under appeal here, or any other part of the record this Court has found mention a challenge to the validity of the underlying tax liability.

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[3] This limitation on the scope of review prevents this Court's consideration of any claimed change circumstances since Living Care's due process hearing. See Doc. 9, p. 7. The Court notes, however, that it does not appear Plaintiff is completely without recourse if there are in fact changed circumstances that warrant a change in the IRS's earlier determination. See 26 C.F.R. § 301.6330-1(h).

Abuse of discretion, the standard that the Court is thus to employ in conducting its review here, has been described in various ways by our circuit. As noted by some of our district courts:

> An abuse of discretion is an arbitrary action not justifiable in light of the facts and circumstances presented in the record. *Gonzalez v. INS*, 996 F.2d 808, 808 (6th Cir. 1993); *Balani v. INS*, 669 F.2d 1157, 1161 (6th Cir. 1982); *NLRB v. Guernsey-Muskingum Electric Coop., Inc.*, 285 F.2d 8, 11 (6th Cir. 1960). The Sixth Circuit has held that an agency abuses its discretion if its decision "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis...." *Gonzalez*, 996 F.2d at 808; *Balani*, 669 F.2d at 1161.

Dudley's Commercial and Industrial Coating, Inc., at 985.

> ....Under the abuse of discretion standard, a determination will be affirmed unless the Court determines with a "definite and firm conviction" that a clear error of judgment has been committed. *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998).

Bonfante, 2002 WL 373407 *6. In applying any formulation of the test, however, it is well settled that the court is not free to substitute its judgment for that of the administrative agency. See generally, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971);

Cellnet Communications. Inc. v. Federal Communications Comm'r, 149 F.3d 429 (6th Cir. 1998).

Plaintiff also argues in effect that even if *de novo* review is not required, the case should be remanded for a new Collection Due Process hearing because the record is inadequate to show that applicable statutory and regulatory requirements for administrative review have been met, citing *Mesa Oil, Inc. v. United States*, 2000 WL 1745280 (D.C. Colo. Nov. 21, 2000). Doc. 9, pp. 13-14. The Court, however, finds the record in this case distinguishable from that which apparently confronted the court in *Mesa Oil* and, perhaps more important, a sufficient record to conduct the review of administrative action authorized by the statute and called for by the applicable regulations in this case.

In *Mesa Oil*, the court ordered remand for a new hearing in part because it found that "the [AO's] sparse Determination gives every indication that the 'proposed collection action [was] approved solely because the IRS show[ed] that it ha[d] followed the appropriate procedures'" and "[t]here is no indication that the AO actually engaged in the required analysis prior to making her Determination."[4] 2000 WL 1745280 *4, *5. In this case, Living Care concedes that it was given a due process hearing at which the company's president spoke on its behalf. Doc. 9, p. 9.

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[4] The *Mesa Oil* court also found that the AO who had conducted the due process hearing there violated the statute's requirement of no prior involvement with the case (2000 WL 1745280 at *5), a situation that is not suggested to exist here.

It is true the hearing was conducted by telephone and without sworn testimony or recording, but that is permissible under the statute and applicable regulations. See 26 CFR §301.6330-1(d); *Jewett* at 966-67. Further, the AO's Determination in this case is clearly more through and appropriate in its factual review and analysis than was the one which apparently confronted the court in *Mesa Oil*. Compare *Compucel Service Corporation v. Commissioner of Internal Revenue*, 2002 WL 442254 at *3 (D. Md. Feb. 15, 2002).

For example, the *Mesa Oil* court states that the AO's Determination in that case "gives no statement of facts, no legal analysis, and no explanation of how or why the proposed levy balanced the need for collection with Mesa's interests" (2000 WL 1745280 *5), none of which can truthfully be said of the AO's Determination in this case. Here, in nearly five, primarily single-spaced, pages the history and present status of Living Care's withholding tax problems[5] that led to its due process hearing are set out, discussed, and analyzed in the context of the applicable statutes and regulations. Further, and contrary to Living Care's assertion, the Court believes it is clear that the AO considered more than just what he knew prior to

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[5] Problems going back to mid-1993 and continuing to accrue intermittently and without complete resolution through the very quarter in which Living Care's due process hearing in this case was held. See Notice of Determination, Doc. 8, Ex. G attch. p

Living Care's hearing.[6] Finally, here there *is* an explanation of why the proposed levy represents a reasonable balance of the need for efficient collection of taxes with the taxpayers legitimate concern that such action be no more intrusive than necessary. See 26 U.S.C. §6330(c)(3).

After reviewing Living Care's continuing tax liability situation, the failure of its past efforts to correct that situation, and its current and prospective inability to correct the situation or even sell its business. the AO concludes:

> .... In balancing the need for efficient tax collection with alternative collection methods you have failed to provide us with an alternative collection that would satisfy your liability. On that basis, we conclude that a Levy is the next reasonable step the Service must take in its efforts to collect the tax liability .... In the absence of a reasonable collection alternative, the intent to levy should be sustained, albeit more intrusive than other collection alternatives.

Notice of Determination, Doc. 8, Ex. G attch., p. 5. In light of the facts and circumstances disclosed by the record, this Court can not conclude that sustaining of the levies in this case is an unjustifiable and arbitrary action or one that has been made without rational

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[6] There are two different references in the Notice of Determination to things that Living Care's president agreed to or admitted during "our conference." *Id.*, pp. 4, 5.

explanation or in departure from established policies, and it is nowhere suggested that the decision rests on some impermissible basis. This conclusion that the levies should be sustained might, or might not, be the one reached by this Court if it had conducted Living Care's due process review and hearing, but even if it were not, the Court would not be free in this appeal to substitute its judgment for that of the Defendant IRS.

Consistent with the foregoing, Defendant IRS's motion (Doc. 8) to dismiss that portion of the Complaint (Doc. 1) seeking review and/or other action by the Court respecting the results of Plaintiffs equivalent hearing (Decision Letter, Doc. 8, Ex. E) on Notice of Federal Tax Lien against Defendant Living Care dated May 21, 2001 (Doc. 8, Ex. A) is GRANTED. Further, treating Defendant IRS's motion and memorandum for summary judgment (Doc. 8) as a motion for judgment on the pleadings seeking to have the Court affirm the results of Plaintiffs Collection Due Process hearing (Notice of Determination, Doc. 8, Ex. G) on the Notices of Intent to Levy against Defendant Living Care dated August 22 and September 5, 2001 (Doc. 8, Exs. B, D), such motion is GRANTED.

Whereupon, the Clerk shall enter JUDGMENT for Defendant United States of America Internal Revenue Service dismissing Plaintiff's Complaint with prejudice insofar as it seeks review of Defendant's June 21, 2001 Decision Letter respecting the tax liens against Plaintiff listed therein and affirming Defendant's June 21, 2002 Notice of Determination respecting the tax levies against Plaintiff listed therein.

IT IS SO ORDERED.

3-22-2004
Dated

/s/
Edmund A. Sargus, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 02: 03-CV-0359

[Filed January 12, 2004]

LIVING CARE ALTERNATIVES OF UTICA, INC., Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, Defendant.	)

OPINION AND ORDER

This matter is before the Court on Defendant United States Internal Revenue Services' ("IRS") Motion for Summary Judgment (Doc. # 15); Plaintiff Living Care Alternatives of Utica, Inc.'s ("Living Care" or "taxpayer") Memorandum Contra to Defendants' Motion for Summary Judgment (Doc. # 18); and Defendants' Reply Memorandum in Support of Its Motion for Summary Judgment (Doc. # 20). For the following reasons, Defendants' motion is **GRANTED**.

I. NATURE OF PROCEEDINGS

Plaintiff, Living Care, is an Ohio corporation licensed to operate as a nursing home and is a "taxpayer" for federal tax purposes. Living Care seeks judicial review of an IRS collection due process hearing where the IRS sustained the issuance of a lien and levy against Living Care. Defendant has moved for summary judgment, arguing that the decision of the IRS Appeals Officer ("AO") to uphold the IRS's proposed collection action was not an abuse of discretion and should be sustained.

II. STANDARD OF REVIEW

The procedure for considering whether summary judgment is appropriate is set forth in Federal Rule of Civil Procedure 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The evidence must be viewed in the light most favorable to the nonmoving party.

Adickes v. Kress & Co., 398 U.S. 144, 158-159 (1970). Summary judgment will not lie if the dispute about material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986). Summary Judgment is

appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, (1986); *see also Matsuchita Electronic Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment'" *Id.* (quoting *Liberty Lobby,* 477 U.S. at 257). The non moving party must adduce more than a mere scintilla of evidence in order to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita,* 475 U.S. at 586). Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III. FACTS

On December 12, 2003, via telephone, a collection due process hearing was held with respect to the IRS's intent to levy and notice of lien filing against Living Care. The AO's "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330"

("Def. Ex. D") explains that the federal tax lien filing and the notice of intent to levy were the result of Living Care's failure to pay over withheld payroll taxes. (Def. Ex. A & B.) According to the AO's report, at the time of the hearing Living Care's total unpaid tax liability was approximately $ 400,000.00. (Def. Ex. D).

Living Care raised the following issues at the collection due process hearing: (1) the appropriateness of the IRS's collection action; (2) the collection alternative of selling the nursing home; (3) the collection alternative of an offer-in-compromise. After discussing these issues, the AO determined that Living Care's collection alternative was not appropriate and that Living Care did not qualify for the offer-in-compromise. (Def. Ex. D.) Thus, the AO sustained the levy and lien action.

IV. DISCUSSION

A. Standard

Living Care first argues that the Court should conduct a de novo review of the AO's decision. In the instant case such an extensive review is inappropriate. Sections 6330 and 6320 of the Internal Revenue Code provide for limited judicial review of the timely-requested collection due process hearing. 26 U.S.C. § 6320(c) and § 6330(d). The Court's review jurisdiction under § 6330(d) is limited to the issues properly raised and considered during the due process collection hearing. *See* Treas. Reg. § 301.6330-1(f)(2), Q-45 & A-45 (1999).

When a taxpayer is not challenging the underlying tax liabilities, the sole issue before the court is whether the appeals officer abused his discretion in deciding the appeal before him. *See Bonfante v. U.S.*, 2002 WL 373407, *5 (S.D. Ohio January 2, 2002) (noting that in cases where the validity of the underlying tax liability itself is properly at issue in the hearing, the administrative determination will be reviewed de novo. Where the validity of the underlying tax liability is not properly part of the appeal, the taxpayer may challenge the determination for abuse of discretion.) *See also* H.R. Conf. Rep. No. 105-599, at 266 (1998); *Goza v. Comm'r of Internal Revenue,* 114 T.C. 176, 181-182 (2000) (concluding that a court must review the IRS officer's determinations using an abuse of discretion standard when the validity of the tax liability itself is not at issue); *MRCA Info. Services v. United States,* 145 F. Supp. 2d 194, 199 (D. Conn. 2000); *Geller v. United States,* 88 A.F.T.R.2d 6494, 2001 WL 1346669, *2 (S.D. Ohio Sept. 25, 2001).

Living Care argues that it "has challenged the underlying tax liability" (Pl.'s Mem. Opp'n at 13). However, there is no evidence before the Court to support this assertion. To the contrary, a review of the evidence before the Court indicates that Living Care has never disputed the underlying tax liability.

For example, the AO's report states that "the underlying tax was not challenged" at the collection due process hearing. (Def. Ex. D at 3.) The AO's report explains how Living Care admitted to the underlying tax liability: "The taxpayer's admission that he [Mr. Rosser, Living Care's President] made the calculated business decision to pay other debts rather

than pay over withheld taxes cannot be a basis for an Appeals decision to grant relief." (Def. Ex. D at 3.) Moreover, Living Care's Complaint admits to Living Care's tax liability: "Plaintiff was unable to pay or pay timely all federal withholding taxes" (Pl.'s Compl. ¶ 5). Living Care's Complaint also states that the collection due process hearing: "Plaintiff presented its explanation for its inability to pay taxes...." (Pl.'s Compl. ¶ 7.) Both Plaintiff's Complaint and the AO's report prove that Living Care's underlying tax liability was not at issue during the collection due process hearing.

Next, Living Care argues that the collection due process hearing record is incomplete with regard to the AO's decision making process, and that such deficiency in the record erodes Living Care's statutory right to judicial review. Living Care submits that from the record before the Court it is impossible to tell what was discussed at the hearing, and what factors were considered by the AO in making his determination to uphold the IRS collection action. *See Mesa Oil, Inc. v. U.S.*, 2000 WL 1745280, *4 (D. Colo. November 21, 2000). Under these circumstances, argues Living Care, the Court should review the AO's decision de novo.

In *Mesa Oil*, the court remanded plaintiff's case to the collection appeals level for a more complete review of plaintiff's claim. The court explained:

> The Determination's [the appeals officer's report] blank recitation of the statute gives no indication that the statutory goal of a "meaningful hearing" was accomplished, or that

> actual balancing occurred. Instead, the sparse Determination gives every indication that the "proposed collection action [was] approved solely because the IRS show [ed] that it ha[d] followed appropriate procedures.

Mesa Oil at *4. Unlike the court in *Mesa Oil*, this Court has before it a report from the collection due process hearing which sets forth the issues raised by Living Care, as well as a discussion of those issues. The AO's report explains the collection alternatives raised by Plaintiff and why those collection alternatives were impracticable and unreasonable. In the instant case the AO enumerated specific reasons why the IRS's levy action and lien filing balanced the need for efficient collection of taxes and the concern that a tax collection action be no more intrusive than necessary. *See Id.* at 4. Thus, the Court will review the appeals officer's decision only for the purpose of determining whether the appeals officer abused his discretion.

B. Review

There are no facts which tend to show that the AO abused his discretion when he decided to uphold the IRS's proposed collection action. It is undisputed that Living Care was unable to pay, or timely pay, federal withholding taxes. (Pl.'s Compl. ¶ 5.) Evidence before the Court shows that Living Care had outstanding tax liabilities from as far back as 1995 (Defs.' Mot. at 7), and that at the time of the hearing Living Care's unpaid tax liability was approximately $400,000.00. (Def. Ex. D.) Augmenting these facts is Living Care's

own description of the financial situation it faced at the time of the collection due process hearing.

In essence Living Care's request for a collection due process hearing provides the IRS with a description of Living Care's dire financial state. The request letter acknowledges that the only way for Living Care to pay back taxes, penalty, and interest is through profit. Then the letter goes on to admit that Living Care's dependance on Medicaid and Medicare does not allow Living Care to make this necessary profit. (Pl.'s June 2, 2002 Request Letter). Additionally, the letter arguess that Living Care's financial situation is the result of government actions and that the IRS's collection action would be futile because the Medicaid and Medicare monies payed to Living Care would not be subject to a levy. (Pl.'s June 2, 2002 Request Letter).

Plaintiff's belief that it's tax liability is "a direct result of government agencies' actions" (Pl.'s June 2, 2002 Request Letter) does not negate the interest of the IRS to efficiently collect taxes. Living Care is a taxpayer and cannot "choose" to pay other debts instead of paying withheld taxes. Furthermore, Living Care's assertion that Medicaid and/or Medicare funds are not subject to an IRS lien or levy is simply wrong. While Section 6334 of the Internal Revenue Code exempts certain public assistance payments from levy, § 6334 is inapplicable to Living Care. Section 6334 exempts from levy:

> Any amount payable to an individual as a recipient of public assistance under; (A) Title IV or Title XVI (relating to supplemental security

> income for the aged, blind, and disabled) of the Social Security Act, or (B) state or local government public assistance or public welfare programs for which eligibility is determined by a needs or income test.

26 U.S.C.A. § 6334. Living Care is a corporation, not an individual, thus the amounts payable to Living Care are not exempt from levy under § 6334. Besides this fact, § 6334 does not encompass Medicare payments which fall within Title XVII of the Social Security Act (42 U.S.C. § 1395).

Along with considering Living Care's financial condition and ability to pay owed taxes, the AO analyzed Living Care's alternate collection plan; to sell the nursing home.[1] The AO determined that selling the nursing home was not a reasonable option, noting; "the nursing home has been on the market since April, 2001, with no buyers." (Def. Ex. D at 6.) Plaintiff's Complaint confirms this determination. The Complaint states that during the 1990's time on the market to the closing of the sale for Licking County nursing home facilities was an average of 1 to 10 years. (Pl.'s Compl. ¶ 54.) Requiring the IRS to

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[1] The AO addressed the possible alternative of an offer-in-compromise, and determined that Living Care was not eligible for this alternative. At the time of the collection due process hearing, Living Care had not timely filed and timely deposited its employment tax liabilities for the proceeding two quarters. *See* Def. Ex. D at 6. Thus, it was not an abuse of discretion for the appeals officer to determine that the alternative of an offer-in-compromise was an inappropriate collection alternative.

abstain from collecting hundreds of dollars in accrued taxes for an indefinite period, a period that could be up to ten years, is nonsensical. The facts show that it was not an abuse of discretion for the AO to determine that Living Care's proposal to sell the nursing home was not an appropriate alternative to the lien and levy.

Finally, while Living Care argues, and the AO's report notes, that Living Care appeared to be current for both the 3rd and 4th quarters of 2002, this fact does not prove that the AO abused his discretion by sustaining the levy action.[2] Decisions by appeals officers may be based upon a number of factors, including, but not limited to: (1) whether the taxpayer had previously agreed to a collection alternative; (2) whether the taxpayer supported a collection alternative with relevant information to show that payments could be made under the alternative; (3) whether the taxpayer is current on its tax obligations; (4) the escalating amount of the outstanding tax liability; and (5) the IRS's need to collect the tax liability. *See* Tres. Reg. § 301.6330-1(e)(1).

The instant record reveals that the AO considered Living Care's present financial situation, along with the fact that Living Care owed approximately $400,00.00 in overdue taxes, extending as far back as

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[2] Plaintiff's arguments regarding changes in circumstances since the collection due process hearing will not be considered. The Court's jurisdiction is limited to review of the administrative record before the appeals officer. *See Konkel v. Commissioner of Internal Revenue*, 2000 WL 1819417 (M.D. Fla. November 6, 2000).

1995. The AO considered Living Care's acknowledgment of its inability to make payments on the back taxes, and the slim possibility that the nursing home could be profitably sold in a timely manner. All of these factors, discussed in the AO's determination report, support his decision to uphold the IRS collection action.

V. CONCLUSION

The record shows that there was an adequate basis in law and fact for the appeals officer's decision to uphold the Internal Revenue Service's proposed collection action. Thus, there was no abuse of discretion in the appeals officer's decision, Defendant's motion for summary judgment (doc. # 20) is **GRANTED**. This case is hereby **TERMINATED**.

/s/ Gregory L. Frost
Gregory L. Frost
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-3194/3554

[Filed June 2, 2005]

LIVING CARE ALTERNATIVES OF UTICA, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.

Before: KEITH, MERRITT, and CLAY, Circuit Judges.

OPINION

MERRITT, Circuit Judge. This opinion addresses separate appeals from two district court cases involving the same parties and almost identical issues. Plaintiff, Living Care Alternatives of Utica, Inc.

("Living Care"), appeals district court decisions affirming the Internal Revenue Service's Appeals Office decisions to allow tax liens and levies on Living Care's property for unpaid employment taxes for various periods between 1995 and 2001. These appeals require an interpretation of the new Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. For the reasons set forth below, we affirm.

SUMMARY OF FACTS

Living Care owns and operates a nursing home facility in Licking County, Ohio, which has approximately thirty-five beds and forty employees and receives ninety percent of its revenue from Medicare and Medicaid billing. This revenue totals approximately $100,000 per month. Since the mid-1990's, Living Care has struggled to comply with its tax obligations. The taxes at issue in the instant cases are payroll taxes withheld from employees' paychecks and held in trust by the employer until payments are made to the government. From 1995 to 2001, Living Care has intermittently failed to forward the required taxes to the IRS. (Living Care I, Case No. 04-3194 involves annual payments for tax year 1999 and quarterly payments in 1999 and 2001; Living Care II, Case No. 04-3554 involves annual payments for tax years 1995, 1998 and 2000 and quarterly taxes for various quarters in 1995, 1996, 1999, 2000 and 2001).[1]

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[1] Although the administrative hearing for *Living Care II* was held first, the District Court decided the case second. It will therefore be referred to as *Living Care II*.

Under a previous levy around 1996 or 1997, Living Care entered into an installment agreement with the IRS, but defaulted in 1999. The total current liability (including interest and penalties) is approximately $450,000, although Living Care points out it has paid its newly accrued taxes since July 2002.

In May 2001 and May 2002, the government sent Notices of Federal Tax Liens and Notices of Intent to Levy to Living Care, along with a notice of the taxpayer's right to request a hearing before the IRS Appeals Office, which the taxpayer timely invoked. Collection due process hearings were conducted by phone in March 2002 (Living Care II, Case No. 04-3554) and December 2002 (Living Care I, Case No. 04-3194). Notice of Determination letters denying Living Care's claims were mailed June 2002 and March 2003, respectively. Living Care appealed these decisions separately to the District Court for the Southern District of Ohio. In both cases, which were heard by different judges, the courts affirmed the IRS.[2] *See Living Care Alternatives of Utica, Inc. v. United States* (*Living Care I*), No. 02:03-CV-0359, 2003 WL 23311523 (S.D. Ohio Dec. 12, 2003); *Living Care Alternatives of Utica, Inc. v. United States (Living Care II)*, 312 F. Supp. 2d 929 (S.D. Ohio 2004). Living Care now appeals these decisions.

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[2]Other tax periods were the subject of other collection due process hearings and at least three other district court appeals. According to Living Care's Briefs, these cases are awaiting various decisions in the district courts. *See* Living Care Proof Br. (Case No. 04-3554) at 21 n.7.

ANALYSIS

I. Judicial Review of Collection Due Process Proceedings

Collection due process hearings were created by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 ("the Restructuring and Reform Act").[3] The method or standards for judicial review of these hearings is not yet settled, hence the problems in these cases. Prior to this Act, the IRS had the right to levy on taxpayer property without any prior opportunity for a hearing or procedural due process, so long as post-deprivation procedures were provided. The Supreme Court sustained this approach almost seventy-five years ago. *See Phillips v. Commissioner*, 283 U.S. 589, 595 (1931). While passage of the Restructuring and Reform Act

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[3] The Commissioner of Internal Revenue shall develop and implement a plan to reorganize the Internal Revenue Service. The plan shall . . . eliminate or substantially modify the existing organization of the Internal Revenue Service which is based on a national, regional, and district structure; . . . establish organizational units serving particular groups of taxpayers with similar needs; and . . . ensure an independent appeals function within the Internal Revenue Service, including the prohibition of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.

The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001, 112 Stat. 685, 689 (1998).

does indicate Congress's intent to provide taxpayers with additional protection in the form of procedures prior to IRS action, it must be interpreted in this historical context. Tax liens and levies are not typical collection actions; the IRS has much greater latitude and leeway than a normal creditor. *See generally* Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?* 41 Hous. L. Rev. 1145 (2004) (discussing the history of due process in tax collection proceedings).

The Tax Code grants taxpayers the right to a hearing both on notice of lien and on notice of levy. *See* 26 U.S.C. § 6320(b); 26 U.S.C. § 6330(b). Proceedings are informal and may be conducted via correspondence, over the phone or face to face. *See* Treas. Reg. § 601.106(c) & § 301.6330-1, Q&A-D6. No transcript, recording, or other direct documentation of the proceeding is required. *See id.* § 301.6330-1, Q&A-D6. Taxpayers do have a right to an impartial hearing officer "who has had no prior involvement with respect to the unpaid tax . . . before the first hearing." 26 U.S.C. § 6320(b)(3). A taxpayer may challenge his underlying tax liability at the collection due process hearing, only if he "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B). Any other relevant issue relating to the unpaid tax may be raised during the hearing, including spousal defenses, challenges to the appropriateness of collection actions, and alternative collection options (such as posting of a bond, installment agreements, or offers in compromise). 26 U.S.C. § 6330(c)(2)(A). By statute, the IRS Appeals Officer must: 1) conduct a verification that the IRS has

met all legal requirements and fulfilled its procedural obligations to move forward with the lien or levy, 2) consider defenses and collection alternatives proffered by the taxpayer and, 3) make a determination that the "proposed collection action *balances* the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." 26 U.S.C. § 6330(c)(3) (emphasis added). This final balancing factor is novel in American tax law and injects into the calculus an equitable consideration for the taxpayer and his concerns. Not surprisingly, the taxpayer in the instant cases relies quite heavily on this factor in its arguments for relief.

On completion of his review, the Appeals Officer sends his final decision to the taxpayer in a Notice of Determination letter. The statutes then allow for judicial review of this determination by whatever federal court has jurisdiction over the underlying tax (either the Tax Court or the District Courts).

We review a district court's grant of summary judgment *de novo*.[4] Both the parties and the district court judges in these cases agreed that it was proper to

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[4] The District Court in *Living Care II*, 312 F. Supp. 2d at 933, determined that motions for summary judgment make no sense in the context of judicial review of agency decisions. Therefore, the court treated the motions for summary judgment as cross-motions for judgment on the pleadings. Many courts, including this one, have allowed motions for summary judgment when reviewing collection due process hearings. *See e.g., Herip v. United States*, No. 02-4078, 2004 WL 1987302 (6th Cir. Sept. 2, 2004) (unpublished).

review the IRS Appeals Office *de novo* with respect to decisions about the underlying tax liability and for abuse of discretion with respect to all other decisions, *see Bartley v. United States*, 343 F. Supp. 2d. 649, 652 (N.D. Ohio 2004), but the parties disagreed about whether the underlying liability was actually challenged in these cases. *See* Part II.A., *infra*. Finally, the district court may only review issues that were originally raised in the collection due process hearing. *See* Treas. Reg. § 301.6330-1(f)(2), Q-F5 & A-F5.

Judicial review of collection due process hearings presents a real problem for reviewing courts. Congress overlaid the Restructuring and Reform Act on a previous system that involved very little judicial oversight. The result is a surprisingly scant record, comprised almost exclusively of the parties' appellate briefs and the Notice of Determination letter. No transcript or official record of the hearing is required and, accordingly, one rarely exists. Since normal review of administrative decisions requires the existence of a record, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *overruled on unrelated grounds by Califino v. Sanders*, 430 U.S. 99, 105 (1977), Congress must have been contemplating a more deferential review of these tax appeals than of more formal agency decisions. This might explain why, of six collection due process cases reviewed by the Sixth Circuit, five have been disposed of under our Court's Rule 34 and all six have been unpublished. None has overturned the IRS decision or required a remand. *See Herip v. United States*, No. 02-4078, 2004 WL 1987302 (6th Cir. Sept. 2, 2004) (unpublished); *Minion v. Commissioner*, No. 03-1337, 2003 WL

22434751 (6th Cir. Oct. 24, 2003) (unpublished); *Wasson v. Commissioner*, No. 02-2134, 2003 WL 1516288 (6th Cir. Mar. 21, 2003) (unpublished); *Hauck v. Commissioner*, No. 02-2301, 2003 WL 21005238 (6th Cir. May 2, 2003) (unpublished); *Brown v. Commissioner*, No. 02-1630, 2002 WL 31863695 (6th Cir. Dec. 19, 2002) (unpublished); *Diefenbaugh v. Weiss*, No. 00-3344, 2000 WL 1679510 (6th Cir. Nov. 3, 2000) (unpublished).

II. Living Care's Claims

Living Care raises four identical claims in each case. They will therefore be analyzed together.

A. District Court Applied an Incorrect Standard of Review

Living Care agrees with the government that, in order to receive a *de novo* review of the Appeals Officers' decisions, it had to have challenged the validity of the underlying tax liability at the collection due process hearings. Otherwise, the Appeals Officers' decisions are reviewed for abuse of discretion.[5]

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[5] Since the statute itself is silent as to the appropriate standard, the legislative history of the Restructuring and Reform Act is often cited for establishing this two-tiered approach.

> Where the validity of the tax liability was properly at issue in the hearing, and where the determination with regard to the tax liability is part of the appeal, no levy may take place during the pendency of the appeal. The amount of the tax liability will in such cases be reviewed by the appropriate court on a de novo basis. Where the

Living Care's evidence that it challenged the validity of the underlying liability is exceptionally weak. One of the Notice of Determination letters does not mention this issue at all and the other states "The underlying tax was not challenged." Living Care therefore argues that the Appeals Officers misconstrued and misunderstood its attempts to challenge the tax.

In large part, its argument is based on the premise that "nursing homes are different." Living Care's facility receives almost all of its income from government programs (Medicare and Medicaid) that require strict compliance with comprehensive regulatory regimes. These regimes limit the possibility for profit, control and limit admission of new patients, and mandate high standards in the areas of staffing, food, and medical care. Living Care argues that the regulatory regime became particularly oppressive starting in the mid 1990's.

> These government mandated changes resulted in Living Care not being able to pay all its withholding obligations. The government required that Living Care meet the increased mandated care requirements and staffing requirements. Living Care did this and when

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validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion.

Goza v. Commissioner, 114 T.C. 176, 181 (2000) (quoting with approval H.R. Conf. Rept. No. 105-599, at 266 (1998)).

> the decision had to be made between paying for resident care and taxes, Living Care paid for the food, utilities, medications, staffing etc [sic] and delayed the payment of taxes - taxes were not simply refused or neglected.

Living Care Proof Br. (Case No. 04-3554) at 18. Living Care maintains that it relied on the above argument during the collection due process hearings and that this argument was equivalent to challenging the underlying liability itself.[6] Furthermore, it argues

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[6] In another section of its Brief, Living Care presents the argument this way:

> Here Living Care submits that the District Court erred in concluding that Living Care did not challenge the underlying tax liability. Living Care may not have talked "tax code" language, but it did talk the normal language of the nursing home business. Living Care explained the Catch 22 of government funding and mndates, [sic] where the government gives on the one hand and takes with the other. Government requirements ruled all aspects of operation and mandated that Living Care do and provide certain things, while at the same time kept out new residents and decreased occupancy, penalized the nursing home for low occupancy and decreased funding.Yet the government required the payment of taxes timely and then the payment of interest and penalties (but which Medicaid will not allowed to be reimbursed [sic]). This challenge was made by Living Care in language that has meaning to a nursing home operator. It may not be how an accountant, attorney or IRS agent would phrase such

that the identical requests in its Complaints to the District Courts that the "tax liability be removed" also constituted a challenge to the validity of the liability.

The plain meaning of "challenging validity of the underlying tax liability" requires more than the taxpayer's actions in these cases. Passionately arguing that it is bad public policy to tax a nursing home that was trying in good faith to comply with a comprehensive regulatory scheme is not the same as challenging the validity of the tax. Similarly, requesting that a district court "remove" a tax liability does not constitute a claim at the IRS hearing and is not an assertion that the liability was not valid in the first place; to the contrary, it seems to be admitting it was valid and then requesting that payment be excused. Therefore, all aspects of the Appeals Officers' decisions are reviewed for abuse of discretion.

B. Abuse of Discretion in the Balancing Analysis

The Tax Code requires that an IRS Appeals Officer, in making a final determination after a collection due process hearing, decide "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the [taxpayer] that any collection action be no more

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a challenge. But the taxpayer did challenge it in the Request for Hearing and at the hearing.

Living Care Proof Br. (Case No. 04-3554) at 32.

intrusive than necessary." 26 U.S.C. § 6330(c)(3)(C).[7] There is little discussion or guidance about this requirement in legal scholarship or case law. *But see*, Book, *The Collection Due Process Rights, supra*, at 1185-93. In most cases, reviewing courts have merely affirmed the Appeals Officer's determination that he conducted the balancing test and that he found the results to be consistent with the decision to proceed with levying the property. *See e.g.*, *Jackling v. IRS*, 352 F. Supp. 2d 129 (D.N.H. 2004); *Elkins v. United States*, No. 4:03-CV-97-1 (CDL), 2004 WL 3187094 (M.D. Ga. Sept. 29, 2004). One notable exception to this pattern is found in *Mesa Oil, Inc. v. United States*, No. Civ.A. 00-B-851, 2000 WL 1745280 (D. Colo. Nov. 21, 2000) (unpublished), where an oil company fell behind in its payroll tax deposits over a six quarter period, totaling about $425,000. There the district court, reviewing an IRS Appeals Officer's collection due process hearing and Notice of Determination, remanded the case to the IRS for development of a more complete record and clarification of the reasoning behind the determination that the balancing test was met. The court was especially concerned that the Notice of Determination included "no statement of facts, no legal analysis, and no explanation of how or why the proposed levy balanced the need for collection with [the taxpayer's] interests" but merely a "blank recitation of the statute." *Id.* at *4; *accord Cox v. United States*, 345 F.

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[7]The other two issues that must be addressed are verification that applicable law and procedures were followed and other relevant issues raised at the hearing (such as defenses and collection alternatives). *See* 26 U.S.C. § 6330(c).

Supp. 2d 1218 (W.D. Okla. 2004) (citing positively *Mesa Oil's* remand for further development of the record and ruling that balancing did not occur because the IRS erroneously believed taxpayer was ineligible for installment agreement). *Mesa Oil's* remand is an exception to the general practice of reviewing courts showing deference to Appeals Officers' conclusions regarding the balancing analysis.

In the instant appeals, Living Care presents three related arguments to support its claim that the balancing test was not met, or more accurately, that the Appeals Officers abused their discretion in conducting the balancing test. First, Living Care claims the Appeals Officers failed to include the existence of senior lienholders in their balancing analyses, in spite of the discussion of this fact during the hearings.[8] Second, the Officers failed to consider that, because of these senior lienholders, the net effect of an IRS levy would be to shut down the business without generating any tax revenue for the government. Since the IRS liens would be junior to existing creditors and the existing debt exceeded the value of the property, the IRS would collect nothing. Finally, in its Reply Brief in the Living Care II case (Case No. 04-3554), Living Care correctly alleges,

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[8] Living Care also attempts to argue that the Appeals Officers disregarded *all* additional information provided during the hearing, instead relying only on the information in its Request for Hearing. This argument is undermined, at least in Living Care II, by statements in the Notice of Determination such as "During our conference you agreed that. . ." J.A. Living Care II (Case No. 04-3554) at 17, and ". . . you admitted during our conference that . . ." *Id.* at 18.

albeit for the first time, that the IRS has a statutory duty to investigate, prior to executing a levy, the existence of liens on the property and determine "that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to [taxpayer's] liability." 26 U.S.C. § 6331(j)(2)(C).

The government first responds that the Appeals Officers were aware of the other lienholders, as evidenced by the statement in the Notice of Determination from Living Care I that "[i]f the business sells, proceeds will be distributed according to priority of claims. (Lien priority)." In Living Care II, the government argues that Living Care's Request for Hearing makes no mention of these senior liens and that there is no evidence they were mentioned during the hearing. The lack of evidence from the hearing is potentially misleading since there is no formal record of the hearing and the government itself prepared the only account of what was discussed. The government's stronger argument, made in the alternative, is that even if the senior liens were raised and ignored, there is no requirement that the government consider in its balancing analysis whether it will receive any revenue from a levy and sale, or whether the business will have to close down due to the levy and sale. It cites several cases for these propositions. *See Medlock v. United States*, 325 F. Supp. 2d 1064 (C.D. Cal. 2003); *Cardinal Healthcare, Inc. v. United States*, No. 01-4300-JLF, 2002 WL 31002880 (S.D. Ill. July 25, 2002); *Kitchen Cabinets, Inc. v. United States*, No. Civ.A.3:00CV0599M, 2001 WL 237384 (N.D. Tex. Mar. 6, 2001). The case law supports the proposition that the government is not required to continue subsidizing failing businesses by

foregoing tax collection. Any other conclusion would create a bizarre tax system with perverse incentives for businesses to maintain themselves on the edge of insolvency in order to enjoy immunity from tax enforcement.

The government's response to Living Care's statutory argument (which the government first offered at oral argument since Living Care first raised the statute in its Reply Brief) is that the statutory duty has not yet arisen. All that the statute requires is that the IRS investigate the equity in a property prior to levying on it, not prior to the collection due process hearing. The only court that has apparently addressed this issue did so in the context of the collection due process verification requirement and agreed that the statutory investigation was not required prior to a collection due process hearing. In *Medlock*, 325.F. Supp. 2d at 1079, the district court said:

> Appeals Officer Rich was not required, during the [Collection Due Process] Appeal process, to determine whether the equity in Medlock's property was sufficient to yield net proceeds . . . or investigate the status of Medlock's property . . . . According to the plain language of the relevant statutory sections, [6331(f) and 6331(j)] these actions must be taken before a taxpayer's property may be levied upon by the IRS but are prematurely raised at this stage of the collection process. Appeals Officer Rich's alleged failure to perform those actions therefore does not constitute a violation of [the collection due process statutes].

We agree with this reasoning and find no statutory violation arising from the IRS's failure to investigate at this time the available equity in the taxpayer's property. This failure cannot, therefore, provide the basis for overturning the Appeals Officers' balancing analyses or final decisions.

C. Insufficient Record for Review

Living Care includes this issue in its request for a *de novo* review by this court, "with a hearing that more closely resembles an evidentiary hearing and gives the taxpayer the opportunity to have what he presents actually recorded for future review." Living Care Proof Br. (Case No. 043554) at 37. Since it would be inappropriate for this Court to hold an evidentiary hearing under these circumstances, we consider this claim as a request to remand the cases either to the district courts or to the IRS for development of a more thorough record. Not surprisingly, Living Care cites *Mesa Oil* in support of its request. Only the court in *Mesa Oil* has gone so far as to remand to the IRS in a collection due process case with an order that the new hearing have a record "made either through audio tape recording, video tape recording, or stenographer." *Mesa Oil,* 2000 WL 1745280 at *7. The court there expressed concern that the Notice of Determination's lack of analysis amounted to no record whatsoever and therefore did not allow for a meaningful review. While this is a conventional remedy in administrative law cases, it was extraordinary in the area of tax collection. As discussed earlier, the notion of due process in tax collection is not the same as in other areas of the law. The IRS has historically had broad discretion and the right to levy on property without any pre-seizure

process. The 1998 reform did provide for additional procedural protections, but it still does not require the creation of a formal record and conventional administrative review. Admittedly, this makes application of the abuse of discretion standard quite difficult, but at the very least, in order to overturn the IRS decisions, we must be convinced that the type of taxpayer abuse that Congress sought to remedy has occurred in the case. Neither of these cases presents such egregious facts.

In both cases below, the District Courts distinguished the Notices of Determination they were reviewing from the one in *Mesa Oil*.

> Unlike the court in *Mesa Oil*, this court has before it a report from the collection due process hearing which sets forth the issues raised by Living Care, as well as a discussion of those issues. The [Appeals Officer's] report explains the collection alternatives raised by Plaintiff and why those collection alternatives were impracticable and unreasonable. In the instant case the [Officer] enumerated specific reasons why the IRS's levy action and lien filing balanced the [needs of both parties.]

Living Care I, 2003 WL 23311523 at *3. And similarly, in Living Care II, "the [Appeals Officer's] Determination in this case is clearly more through [sic] and appropriate in its factual review and analysis than was the one which apparently confronted the court in Mesa Oil." *Living Care II*, 312 F. Supp. 2d at 935.

The Notices of Determination in these cases satisfy due process and provide a sufficient basis for an abuse of discretion review, as that standard is applied in tax levy and lien appeals.

D. Abuse of Discretion Not to Allow Offer in Compromise

While Living Care raises this claim in both cases, only the Notice of Determination in Living Care I contains problematic language, meaning the Living Care II claim is without merit.

One of the three areas that Appeals Officers must consider in making their final Determination is offers of collection alternatives made by the taxpayer. At both hearings, Living Care presented plans to either sell the business as a going concern and use the proceeds to pay its tax liabilities or to present an offer in compromise. Living Care rejected the possibility of an installment agreement, since such an agreement would have to be funded from company profits and Medicare and Medicaid billing generally do not allow for profit. Also, under a previous levy around 1996 or 1997, Living Care had entered into an installment agreement with the IRS, and then defaulted in 1999.

The Living Care II Notice of Determination (dated June 21, 2002), *see* J.A. (Case No. 043554) at 12, rejected these plans because the business had currently been on the market for over a year without generating a sale or contract and Living Care was not, at that time, current on its tax payments. The taxpayer must be current on payments for the previous two quarters to be eligible to submit an offer in

compromise. These facts, coupled with Living Care's prior default in 1999 on its installment agreement, fully support the decision to reject the alternatives offered.

The Living Care I Notice of Determination (dated March 25, 2003), *see* J.A. (Case No. 043194) at 51, however, contains contradictory statements. On page 2, the Notice states, "Tax deposits are being made and the taxpayer appears to be current for both the 3rd and 4th quarters of 2002." *Id.* at 54. On page 6, in a section discussing the option of an offer in compromise, it states,

> The two quarters preceding the current quarter are the 2nd and 3rd. The taxpayer owes tax for the 2nd; consequently, the taxpayer will not be eligible until the 1st quarter of 2003. . . . Therefore, *as of the date of this report*, the taxpayer is not eligible for an offer in compromise.

Id. at 58 (emphasis added). The hearing date in Living Care I was December 12, 2002. The date on the Notice of Determination was March 25, 2003. Either the Appeals Officer intended to express his eligibility determination in terms of the date *of the hearing* and simply made a typographical error, or he erroneously determined that Living Care was not eligible as of the date *of the report*, even though his statements on page 2 express recognition that Living Care had made the last two quarter's payments on time.

The government offers several valid responses. First, and most simply, that it was a mere

typographical error that does not reach the level of abuse of discretion. This interpretation would have the Court focus on the date of the hearing, since both sides agree that at that time Living Care was not eligible to submit an offer in compromise. In the alternative, the government argues even if the Appeals Officer did misapply the law, Living Care still had an obligation to actually file an offer in compromise, which it failed to do. Therefore, even if it was eligible, its failure to file the proper financial paperwork and IRS forms led to the same result - a rejection of its collection alternatives. Finally, the government presents a litany of additional bases on which the Appeals Officer could have validly rejected Living Care's alternative collection option. These include Living Care's failure to meet the two quarters requirement as of the time of the hearing, its default under the previous installment payment plan in the late1990's, the escalating amount of unpaid tax liability due to accruing interest and penalties, and the government's need to collect the taxes quickly because of Living Care's financial difficulties.

There is no need to rely on any one of these explanations alone. It is clear that the IRS was well within its discretion to reject Living Care's plan to present an offer in compromise. If the Appeals Officer mistakenly felt his hands were tied because of the two quarters requirement, there are administrative remedies available to point out such mistakes and allow the IRS an opportunity to re-examine its earlier decision. Treas. Reg. § 301-6330-1(h)(1) ("The Appeals office that makes a determination under section 6330 retains jurisdiction over that determination, including any subsequent administrative hearings that may be

requested by the taxpayer regarding levies and any collection action taken or proposed with respect to Appeals' determination."). But for this Court, reviewing the Appeals Officers' decisions for abuse of discretion, Living Care has failed to present sufficient evidence to justify a remand. Otherwise, without a clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS, as contemplated by Congress, the judiciary will inevitably become involved on a daily basis with tax enforcement details that judges are neither qualified, nor have the time, to administer.

For the reasons discussed above, we affirm the decision of the District Courts in these cases.